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No. 2722

IN THE  
**United States Circuit Court of Appeals**

For the Ninth Circuit

WILLIAM HANLEY,

*Appellant,*

vs.

PACIFIC LIVE STOCK COMPANY  
(a corporation),

*Appellee.*

Filed

FEB 17 1916

F. D. Monckton  
Clerk.

**BRIEF FOR APPELLEE**

\_\_\_\_\_  
WIRT MINOR,  
EDWARD F. TREADWELL,  
*Solicitors for Appellee.*  
\_\_\_\_\_

*Filed this*.....*day of February, 1916.*

FRANK D. MONCKTON, *Clerk.*

*By*.....*Deputy Clerk.*





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## BRIEF FOR APPELLEE

### Condition of Record on This Appeal.

Before proceeding to a consideration of this appeal, it is necessary to call the attention of the court to the very unusual and unsatisfactory condition of the record on this appeal, which is deemed to be very prejudicial to the rights of the appellee. After the appeal was perfected, the appellant obtained from the trial court an order, under Equity Rule 75, permitting the testimony to be reproduced in the exact words of the witnesses (Trans. p. 90). The appellant thereupon filed with the clerk of the court the portions of the evidence which he desired incorporated in the record on appeal. The appellee thereupon filed its praecipe requesting that the balance of the testimony be likewise incorporated in the record on appeal. The matter came before the court, and

the court made an order (Record pp. 88-90) providing that the transcript on appeal should be printed and should comprise certain things therein specified, including among others, the "Statement of the evidence as prepared by the appellant and lodged with the clerk of this court," and then provided

"It is further ordered that the whole of the record in this cause, or such parts thereof as the parties may desire, shall be sent to the Circuit Court of Appeals for the Ninth Circuit to be considered on this appeal to supplement the printed record above ordered".

In pursuance of this order the entire record, including all of the testimony in the lower court, was sent to this court, but the appellant proceeded in assumed compliance with the act of February 13, 1911 (Chapter 47) to himself print what he designates "Transcript of the record", but which printed transcript contains only the portions of the testimony prepared by the appellant and lodged with the clerk of the trial court by him, and entirely omits the balance of the testimony requested to be included by the appellee and ordered to be transmitted to this court by the trial judge and actually transmitted to this court. Upon the record being filed with this court, the appellee again filed its praecipe in this court, requiring the omitted part of the record to be printed, and the clerk of this court, in pursuance of that request, has printed the same in a transcript entitled "Portions of original transcript of testimony printed pursuant to praecipes of counsel for appellee, filed January 10 and 13, 1916". The result of this is that disconnected portions of the testimony of each witness will be found in the so-called "Transcript of record" printed by the appellant

and other disconnected portions of the testimony of the same witnesses will be found in the portion of the transcript requested by the appellee and printed by the clerk of this court. We most earnestly insist that the appellant in this regard has not pursued the law and rules of this court in preparing the record on this appeal, and the prejudicial effect to appellee will be obvious to the court when it appears that a large portion of the testimony taken in the lower court, which is referred to in the written opinion of the judge of the trial court and made the basis of his decision, is omitted from the record as made up by the appellant and printed by him in this case. At least one-third of the testimony taken in the lower court and certified to this court and directed by the trial court to be "sent to the Circuit Court of Appeals for the Ninth Circuit to be considered on this appeal" has been entirely omitted from the transcript printed by the appellant, and although it has now been printed it is in separate volumes and the court could not without a laborious examination of the two transcripts read in proper consecutive form the testimony of any one witness in this case. There are several methods provided by Equity Rule 75 and the rules of this court for perfecting a record in this court: One is to have all of the testimony reduced to narrative form and certified by the trial judge, but this was not attempted to be done in this case; second, each party may, as was done in this case, request what shall go into the record of this court, and any disputes as to what is proper are settled by the trial judge. This was done in this case, and the court ordered that the whole of the record in the case should be sent to this court, but the trial court attempted to



provide that the transcript should be printed and the printed transcript should contain certain things, and the whole of the transcript should be sent to this court "and supplement the printed record above ordered". This was entirely irregular. The trial judge has nothing whatever to do with the printing of the record. It is for the trial judge to determine what shall constitute the record on appeal, and he did so properly by directing that the entire record in the case should be sent to the Circuit Court of Appeals, and this was done. After it is determined what is to constitute the record on appeal, the printing is a mere ministerial act, ordinarily to be done by the clerk of this court, but under the act above referred to it may be done by the appellant himself, but there is no rule of law whereby he may print only the portions of the record which he has requested to be sent to this court and leave the burden upon the appellee or the clerk of this court to print the portion of the record which it has requested and which the trial court has ordered to be, and which has in fact been, filed in this court as a part of the record on appeal. Appellant in his brief states that the court ordered the record in the original case "since its inception in 1899" to be brought up. We only interpreted the order to refer to the record in the contempt matter (Appellant's Printed Rec., pp. 88-90), but we are informed that the entire record was sent down, although not printed, and still counsel have on page 72 of their brief attempted to quote from alleged testimony which was no part of the contempt proceeding and not included in the printed record. We therefore earnestly insist that either the appeal should be dismissed for failure to comply with the rules of this court in regard to the printing of the

record, or that the same be dismissed unless a new record is printed containing the portions of the record requested to be printed by both parties in proper consecutive order.

In attempting to present the case to the court on the present record, we will refer to the foregoing printed records as follows: "Appellant's Printed Record" and "Appellee's Printed Record".

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**THE ORDER ADJUDGING HANLEY GUILTY OF CONTEMPT, BEING PUNITIVE AND NOT BEING COMPENSATORY FOR COMPLAINANT'S LOSS CANNOT BE REVIEWED IN THIS COURT BY APPEAL, BUT ONLY BY WRIT OF ERROR, AND THE APPEAL SHOULD THEREFORE BE DISMISSED.**

This rule has been consistently adhered to by the Supreme Court and circuit courts of appeal, as shown by the following cases:

*Bessette v. W. B. Conkey Co.*, 194 U. S. 324; 24 Sup. Ct. 665; 48 L. ed. 997;

*In re Christensen Engineering Co.*, 194 U. S. 458; 24 Sup. Ct. 729; 48 L. ed. 1072;

*In re Merchants' Stock & Grain Co.*, 223 U. S. 639; 56 L. ed. 584;

*Sessions v. Gould*, 63 Fed. 1001;

*Gould v. Sessions*, 67 Fed. 163;

*Kreplik v. Couch Patents Co.*, 190 Fed. 565;

*Continental Gin Co. v. Murray Co.*, 162 Fed. 873;

*Bullock Electric & Mfg. Co. v. Westinghouse El. & Mfg. Co.*, 129 Fed. 101.

The same rule applies where the proceeding is both punitive and remedial, the punitive features always be-

ing held to dominate the case and fix its character for the purpose of review.

*In re Merchants' Stock & Grain Co.*, 223 U. S. 639;  
56 L. ed. 584;

*Kreplik v. Couch Patents Co.*, 190 Fed. 565;

*Continental Gin Co. v. Murray Co.*, 162 Fed. 873.

The proceeding in the case at bar, while entitled in the original case, was also entitled "In the matter of the contempt of William Hanley, Henry Luig, George W. Young, Hull Hotchkiss, Carey Thornburg, James Dalton, Robert Hudspeth and P. G. Smith" (Appellant's Printed Rec., p. 4), and after alleging the contempt contained the following prayer:

"WHEREFORE the said complainant asks that an order to show cause be issued, and that said defendants be dealt with in such manner as may be meet in the premises" (Appellant's Printed Rec., p. 25).

No evidence was introduced as to the pecuniary damage to the complainant, and the court in its opinion as to the defendant Hanley, after adjudging him guilty of contempt and providing how he might purge himself from that contempt, among other things by paying two hundred and fifty dollars for the use by plaintiff, said:

"This sum I consider in no way compensatory for plaintiff's loss, but I impose it by way of warning against any further contempt of the kind. *Gompers v. Buck Stove & Range Co.*, 221 U. S. 418". (Appellant's Printed Rec., p. 73),

and in the formal order the court provided:

"This later sum, however, not to be considered as wholly compensatory for plaintiff's loss". (Appellant's Printed Rec., p. 78).



It would seem clear from this that the punishment imposed was by way of warning, which is one of the prime objects of all criminal penalties, and was expressly designated as not being compensatory, and under these circumstances, it does not seem necessary to consider cases where the record leaves it in doubt whether the proceeding is intended to be punitive or remedial. In the case of *Gompers v. Buck Store & Range Co.*, 221 U. S. 418; 55 L. ed. 797, the court considered such a case and referred to the various matters which are important in determining the character of the proceeding. It held that the title cannot be determinative of the character of a proceeding. (See also to the same effect: *Warden v. Searle*, 121 U. S. 25; 30 L. ed. 857; 7 Sup. Ct. 814; *Ex parte Ah Men*, 77 Cal. 198; *U. S. v. Huff*, 200 Fed. 700, 702).

The fact that costs are allowed is not controlling, for costs are frequently imposed in cases of criminal contempt, and since the costs are for the payment of witness fees and things of that kind, it cannot be very material whose hands they pass through.

*Brown v. Brown*, 4 Ind. 627; 58 Am. Dec. 641;

*In re Chartz*, 29 Nev. 110; 85 Pac. 352;

*State v. Winbauer*, 21 N. D. 70; 128 N. W. 679;

*State v. Duein*, 46 Kans. 695; 27 Pac. 148;

*In re Moore*, 63 N. Car. 397;

*State v. Heiser*, 20 N. D. 357; 127 N. W. 72;

*State v. Rinehart*, 92 Tenn. 270; 21 S. W. 524;

*Ex parte Whitmore*, 9 Utah 441; 35 Pac. 524;

*People v. Rochester etc. Co.*, 76 N. Y. 294.

The court further held that the prayer of the petition which was the basis of the proceeding was largely controlling, and that the prayer in that proceeding, which was for "such relief as the nature of *its case* may require" was appropriate to a civil suit. If the prayer is controlling it will be seen that the prayer in this case was not appropriate to a civil suit, but was

"that the defendants be dealt with in such manner as may be meet in the premises".

Nor is it material to inquire whether the court erred in directing a payment to the complainant which was not compensatory or wholly compensatory. If the court erred, that error could only be corrected by writ of error, and where the fine is partly by way of punishment and partly by way of compensation, the proceeding is deemed criminal and only reviewable on writ of error. (*In re Merchants' Stock & Grain Co.*, 223 U. S. 639, *supra*.)

The fact that the court specified certain things which the defendants might do to purge themselves of the contempt which were for the benefit of the complainant did not change the character of the proceeding, since it is always proper to make such directions for the future guidance of the parties.

*Pages v. McLaren*, 7 N. J. L. J. 309;

*Whartton v. Stoutenburgh*, 39 N. J. Eq. 299;

*Columbia Co. v. Columbia*, 4 S. C. 388;

*Territory v. Nugent*, 1 Martin (La.), 103;

*People v. Van Buren*, 136 N. Y. 252.

### General Outline of Case.

It appears that on October 3, 1899, the Pacific Live Stock Company filed in the United States Circuit Court for the District of Oregon its bill of complaint (\*) against a large number of persons, among other W. D. Hanley, C. H. Voegtly, George W. Young, Hull Hotchkiss and Caspar Luig.

The bill of complaint set up the ownership of a large amount of land in Harney Valley, Oregon, riparian to and irrigated by the waters of Silvies river, and alleged that the defendants had

“wrongfully entered upon the channels of said river and the channels of its forks above said lands of your orator or some of them, and have wrongfully constructed and are wrongfully maintaining divers dams in said channels and ditches leading therefrom”,

and among other things alleged that the defendant William D. Hanley had one dam, the defendants George W. Young, Hull Hotchkiss and C. H. Voegtly had one dam, and the defendant Caspar Luig had one dam, and that by means thereof were diverting the water away from complainant to its irreparable injury (pp. 1113-16).

The prayer of the bill was as follows:

“For as much as your orator can have no adequate relief except in a court of equity and to the end that the defendants may, if they can, show why your orator should not have the relief hereby prayed, your orator asks that they may each be compelled to make answer to this, its bill of complaint, and

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(\*) This bill of complaint is printed in case No. 2036, in this court, and is made a part of the record on appeal herein by reference. (Appellant's Printed Rec., p. 3.)



to make a full disclosure and discovery in regard to the rights or pretended rights, if any they have, for diverting the waters from your orator's said lands and obstructing its flow therein, as is hereinabove charged, and that they may each, according to the best and utmost of their knowledge, remembrance, information and belief, make full, true, direct, and perfect answer to the matters hereinabove stated and charged, but not under oath, an answer under oath being hereby expressly waived.

“And that your honors may be pleased to enter a decree in this cause perpetually enjoining and restraining the said defendants and each of them, their attorneys, agents, servants and employees, from diverting any of the water of Silvies river or the east or west fork thereof from their channels or impeding the flow of any of said water down to and upon your orator's said lands as said water has heretofore been wont to flow therein when not interfered with by the defendants, and that said defendants and each of them may be required to remove their said dams from the said channels of Silvies river and said forks thereof and may be perpetually enjoined and restrained from rebuilding the same or in any manner obstructing the flow of said water, and that your orator may be awarded a judgment against the defendants for its costs and disbursements of this suit and that it may have such further or other relief as to your honors may seem to be just and equitable.”

The defendant W. D. Hanley filed an answer, the affirmative allegations of which will be found on pages 4 to 13 of appellant's printed record. By that answer he alleged that he was the owner of certain land, and the lessee of certain land specifically described in the answer and all situated on the *east fork* of Silvies river and alleged that he was the owner of a dam referred to as the Twenty-one Dam (being situated in section 21,

township 23 south, range 31 east), and a ditch leading from the river to the east above the same known as Upper Hanley Ditch, and also a small ditch on the other side of the river above the same dam onto section twenty-one. The answer further alleged (Appellant's Printed Record, pp. 9-11) that he was the owner of a ditch taking out of the east fork of the river in the north half of section twenty-seven, and referred to herein as the drain ditch,

"and that the same was built to be used and is used by this defendant *solely* for the purpose of draining water from certain of his land as above described, *and was not intended to be used and never has been used by him for the purpose of irrigation*; that there is no dam in connection with said ditch and that by draining the water off from his land through said ditch he prevents a large tract thereof from being so submerged with water as to render it valueless, and that thereby he is enabled to and does reclaim a large body of his land so that the same can and does produce abundant and valuable crops of wild grass every year which is used for hay and pasturage by this defendant".

No right to water through the drain ditch was claimed and no right to maintain any other dams or ditches or divert any other water from the river was set up or alleged. *No claim of right to either the Luig or Young dam or the West Fork was made by him.*

A final decree was entered in the case, which is likewise found in cause No. 2036 in this court, and made part of this record by reference. This decree was entered largely upon certain stipulations which are embodied therein. Among other things, the decree in finding four recited the ownership by W. D. Hanley of the land

owned and leased by him on the east fork of Silvies river. In findings fourteen and fifteen it found the ownership of lands by Mrs. A. E. Young, and George W. Young, in the northeast quarter of section thirty and a leasehold interest in the north half of section twenty-eight (28), township thirty-two (32) south, range twenty-one (21) east. By finding 16 it found that Hull Hotchkiss was the owner of the northwest quarter of section thirty (30), township twenty-three (23) south, range thirty-one (31) east; and that C. H. Voegtly was the owner of the southwest quarter of the same section. By finding 22 it found that Caspar Luig was the owner of certain land in section six (6), township twenty-four (24) south, range thirty-one (31) east. By finding thirty-two (32) the following stipulation was recited as to the defendant W. D. Hanley:

“It is hereby stipulated by and between the complainant, the Pacific Live Stock Company, and the defendant W. D. Hanley, that a decree shall be entered in this suit as follows:

First: That the defendant W. D. Hanley may maintain his dam in the east fork of Silvies river where the same is now constructed and built on and across said river in section 21, township 23 south, range 31 east, Willamette Meridian, and may maintain his ditches leading from said dam as the same are now constructed and built, during the irrigating season of each year and at no other time, the said irrigating season to begin after the spring flood of each year and from the 5th day of May of each year, and shall continue from said time until the 1st day of July of each year; and the said defendant, W. D. Hanley, may retain the waters of said Silvies river during said irrigating season as above described and by means of the dam as the same is now constructed in said river, may divert and use so much thereof by



means of his dam and of the ditches leading therefrom as shall be necessary to irrigate sections 21 and 27 in township 23 south, range 31 east of the Willamette Meridian, also all of section 22 except the south half of the southwest quarter of said section, and also the west half of section 26, also section 35, section 23 and section 25 in said township and range.

Second: That the said W. D. Hanley may maintain his ditch constructed across a portion of the land above described leading out of the east fork of Silvies river on the east side thereof on the south half of section 27 above described and extending south easterly until it enters into and upon the land of the complainant on or near the southwest quarter of the southeast quarter of section 26, township 23 south, range 31 east, W. M., but shall maintain said ditch for the purpose of draining water from the surface of the land above described and not for the purpose of irrigation."

Fourth: If at any time and while the dam of the said W. D. Hanley is open so that it does not obstruct the flow of the water in said river and from natural causes the waters of said east fork of said Silvies River shall overflow its banks upon the land of the said W. D. Hanley, or naturally run through either of the ditches of the said W. D. Hanley leading from the dam of the said W. D. Hanley first above described, said defendant W. D. Hanley shall have the use and enjoyment of so much of the said water of said river as may come upon his land in the manner aforesaid and during such time as the same may run thereon from natural causes and without any obstruction of the channel of said river.

Fifth: Except as above provided in 1, 2, 3, 4, *supra* the complainant shall have a decree in this suit according to the prayer of its complaint."

By finding 35 the following stipulation was recited as to the defendants George W. Young and Mrs. A. E. Young:

“It is hereby stipulated by and between the complainant the Pacific Live Stock Company, and the defendants Geo. W. Young and Mrs. A. E. Young that a decree shall be entered herein against the said defendants and in favor of the complainant as prayed for in the bill of complaint herein, save and except that said decree shall provide that one dam may be maintained in the west fork of Silvies river by said defendants, or either of them, where the same is now constructed and built in, over and upon the said west fork of Silvies river on the lands of the said Mrs. A. E. Young described as the northeast quarter of section 30, T. 23 S., R. 31 E., W. M., and one or more ditches maintained in connection with said dam by said defendants jointly or severally, and the waters of the said west fork of Silvies river obstructed and restricted by said dam and diverted by said dam and said ditches during the irrigating season each year commencing on the 12th day of May each year and ending on the first day of July each year and at no other times, in sufficient quantities to irrigate the lands of the defendants described as the northeast quarter of section 30 and the north half of section 29, T. 23 S., R. 31 E., W. M. Said decree shall further provide that the said defendants Geo. W. Young and Mrs. A. E. Young shall have the use and enjoyment of such waters as may flow from the west fork of Silvies river while the channel in said river is unobstructed and from natural causes at all times when the same shall flow upon said lands by overflowing the banks of said river or by flowing through the ditches of said defendants while the flow of the water in said river is unobstructed by the dam of said defendants above described. Said decree shall further provide that the said Geo. W. Young and Mrs. A. E. Young may maintain their dam at or near the point where the same is now maintained from the 21st day of July to the 23d day of July, both dates inclusive, each year and by means of said dam and their ditches in connection therewith may divert so much of the waters of the west fork of Silvies river as may be

necessary during the period aforesaid to irrigate such land as the said Geo. W. Young and Mrs. A. E. Young may have in garden and orchard upon the lands above described."

By finding thirty-six (36) the following stipulation was recited as to Hull Hotchkiss and C. H. Voegtly:

"It is hereby stipulated by and between the complainant the Pacific Live Stock Company and the defendants C. H. Voegtly and Hull Hotchkiss that a decree shall be entered herein against the said defendants and in favor of said complainant as prayed for in the bill of complaint herein, save and except that said decree shall provide that one dam may be maintained in the west fork of Silvies river by said defendants or any or either of them at or near the place where the same is now constructed and built in, over and upon the said west fork of Silvies river on the lands of the said Geo. W. Young described as the northeast quarter of section 30, T. 23 S., R. 31 E., W. M., and one or more ditches maintained in connection with said dam by said defendants jointly or severally and the waters of the west fork of Silvies river obstructed and restricted by said dam and diverted by said dam and said ditches during the irrigating season each year commencing on the 12th day of May each year and ending on the 1st day of July each year and at no other times, and in sufficient quantities to irrigate the lands of said defendants described as follows, that is to say, the land of said Mrs. A. E. Young are the northeast quarter of section 30 and the north half of section 29, and the lands of the said Hull Hotchkiss are the east half of the northwest quarter and lots 1 and 2 in section 30, and the lands of the said defendant C. H. Voegtly are the east half of the southwest quarter and lots 3 and 4 of section 30, all in township 23 S., R. 31 E., W. M. And said decree shall further provide that the said defendants Hull Hotchkiss and C. H. Voegtly shall have the use and enjoyment of such waters as may flow from the west fork of Silvies river while the

channel in said river is unobstructed and from natural causes at all times when the same shall flow upon said lands by overflowing the banks of said river or by flowing through the ditches of said defendants while the flow of the water in said river is unobstructed by the dam of said defendants above described."

By finding thirty-eight (38) the following stipulation was recited as to the defendant Caspar Luig:

"It is hereby stipulated by and between the complainant the Pacific Live Stock Company and the defendant Casper Luig that a decree shall be entered in this cause against said defendant Casper Luig as prayed for in the bill of complaint, save and except that said decree shall provide that said defendant may maintain his dam in the west fork of Silvies river and thereby obstruct the flow of the water in said west fork of said river where said dam is now constructed in section 31, T. 23 S., R. 31 E., W. M., during the irrigating season each year, such irrigating season to begin on the 15th day of May each year and end on the 1st day of July each year and may use the waters of the west fork of Silvies river so obstructed during said irrigating season for the purpose of and in sufficient quantity to irrigate the east half of the southwest quarter and lots 6 and 7 of section 6 and the southeast quarter of the northwest quarter and lots 3 and 4 and 5 of section 6, all in T. 24 S., R. 31 E., W. M., and upon no other lands and during no other period, and may also use and enjoy so much of the waters of said west fork of Silvies river during all other times as may flow upon said lands or any thereof in the natural flow of the water of said river without obstruction to the channel of said river, and that said defendant Casper Luig shall not be required to remove the frame or skeleton of his said dam at any season but except during the irrigating season shall keep said dam open and the channel of the river unobstructed thereby."



The decree was then entered in accordance with these stipulations, by paragraph eleven (11) as to W. D. Hanley, by paragraph fourteen (14) as to Mrs. A. E. Young and George W. Young, by paragraph fifteen (15) as to Hull Hotchkiss and C. H. Voegtly, and by paragraph seventeen (17) as to Caspar Luig. The decree then contained the following provision:

"19. That the defendants W. D. Hanley, \* \* \* C. H. Voegtly, George W. Young, Mrs. A. E. Young, \* \* \* Hull Hotchkiss, Caspar Luig, \* \* \* and each and all of them and the attorneys, agents, servants and employees of them, and the attorneys, agents, servants and employees of each of them, be and they and each of them are perpetually enjoined and restrained and strictly inhibited from diverting any of the water of Silvies river and any of the water from the east fork of Silvies river and any of the water from the west fork of Silvies river from the channels of said rivers and from the channels of each of said rivers, and that they be and they and each of them are perpetually enjoined and restrained and strictly inhibited from impeding the flow of any of said water to and upon the lands of the complainant hereinbefore described as the said water has heretofore been wont to flow thereon when not interfered with by the said defendants and by the said intervenor, either jointly or severally, and that they be and they are and that each of them be and he is required to remove all and any dams which they or either of them may have, or which any one of them may have, in the channels of Silvies river or in the channels of the east fork of Silvies river or in the channels of the west fork of Silvies river, and that they be and they are and that each of them be and each of them is hereby perpetually enjoined and restrained and strictly inhibited from rebuilding the same, or any thereof; and that they be and they are and that each of them be and each of them hereby is perpetually enjoined and restrained and strictly in-

hibited from in any manner obstructing the flow of the waters of Silvies river and from in any manner obstructing the flow of the waters of the east fork thereof and from in any manner obstructing the flow of the waters in the west fork thereof, and from obstructing the flow of the waters of said rivers, or any thereof, in all and in each of the channels thereof, save and except as is in this decree more particularly set forth.

“20. That this decree shall run in favor of the complainant, its successors and assigns, and against the defendants, their heirs, personal representatives, successors and assigns, and against each of the said defendants and the heirs, personal representatives, successors and assigns of each of said defendants; and against the complainant, its successors and assigns and in favor of the said defendants, their heirs, personal representatives, successors and assigns; and that the waters of Silvies river and the waters of the west fork of Silvies river and the waters of the east fork of Silvies river and the waters in any of the channels of said Silvies river and in any of the channels of the east fork thereof and in any of the channels of the west fork thereof may be used and enjoyed by the defendants only as in this decree is particularly set forth, and not otherwise, and only at the times and in the places and for the purposes in this decree set forth, and not otherwise.”

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### **Object of Decree.**

It will be seen that by this decree the defendants were not given any particular amount of water, but that they were permitted to maintain certain dams and certain ditches and to operate the same at certain specific times, and that they were forbidden to operate them at other times or to otherwise take or divert or obstruct any of the water of the river. The general plan of the decree was

that from the breakup in the early part of March until the early part of May the defendants should not obstruct the flow of the water, but should let it flow freely down to complainant, receiving only the natural overflow or the amount that would run into their ditches without any dams until the particular dates mentioned in May. The only other limitation put on the defendants was the particular land they might irrigate and the particular dams and ditches which they might use for that purpose. It will be seen, therefore, that the decree was largely in the nature of a regulatory decree, the idea being that the complainant would get the bulk of its water during the spring floods between the first of March and the early part of May.

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### **Change of Parties.**

Since the entry of that decree the following changes have occurred as to the parties: Henry Luig succeeded to Caspar Luig; Carey Thornburg has succeeded C. H. Voegtly and William Hanley Company has succeeded to the rights of W. D. Hanley (being the same person as William Hanley referred to in these proceedings and who is the president of the William Hanley Company, Appellant's Printed Record, p. 29).

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### **Violations of Decree.**

It being obvious, therefore, under the terms of this decree, that the complainant was entitled to the unobstructed flow of the water of the river as against the above named parties during the month of March and April, 1915, except to the extent that the water might

flow unobstructed therefrom through their ditches, we proceed to show the manner in which the decree was attempted to be ignored and was violated by the defendant W. D. Hanley, and others, acting with him. In substance this was accomplished in the following manner:

The river in that year, during the ordinary flood period was very low, being only between 130 and 650 feet per second, whereas the years before it was between 300 and 1700 feet (Appellee's Printed Rec., pp. 7-8). By the first of May the river was down to about four hundred and twenty-eight (428) second feet. During the period the complainant was practically without water for the irrigation of its lands, and at times did not even have water for cattle. (Appellant's Printed Rec., pp. 172-4, 156. Appellee's Printed Rec., pp. 60-1). Things being in this condition the defendant Hanley in violation of the decree put all of the boards in the Luig dam and diverted all of the water of the west fork of the river, amounting to 46 second feet, with the exception of about four feet, which went around the dam (Appellee's Printed Rec., pp. 8-9). Above this, on the same fork, the same defendant, W. D. Hanley, claimed to have acquired an interest in the Young dam, and this dam was diverting one and eight-tenths (1.8) feet of water of the river (Appellee's Trans., pp. 9-10). At the same time, the People's Ditch, on the same fork of the river was open, in violation of the decree carrying four and three-tenths (4.3) second feet (Appellee's Printed Rec., pp. 14-15), and while the owners of the ditch denied that they had opened it and the defendant W. D. Hanley admitted that he would have used it if he had seen fit, no satisfactory proof could be offered on the hearing as to who was responsible. Then Thornburg,



an employee of Hanley, built a new dam in section thirty in admitted violation of the decree and while Hanley denied any part in this, admitted the dam was "friendly" to him. (Appellee's Printed Rec., p. 69). On the east fork of the river, the Hanley drain ditch was opened up as late as April 8th, diverting thirty (30) feet of water (Appellant's Printed Rec., pp. 93-4). The Hanley upper ditch was open during the same period and up until the 3d of May, carrying forty (40) second feet (Appellant's Printed Rec., p. 94), and this was being diverted by one board in the Hanley dam and brush against the same, which had been cut and put against the same (Appellant's Printed Rec., pp. 95-6). Going on down through the Hanley property on the east fork, the water was further diverted by "breaks or cuts in the banks; that is, they had the appearance of being cut" (Appellant's Printed Rec., p. 97). The first one was one thousand (1000) feet above the drain ditch and diverted fifty (50) second feet of water. The next one was nine hundred or one thousand feet below the drain ditch and diverting fifty (50) second feet of water. Below that another was taking  $5\frac{1}{2}$  or 6 second feet of water.

"And then in section 35 there was another cut, or a ditch rather, taking out there, that the boards had been in. It was in very bad shape, and was taking about five second feet of water."

And beside these, there were numerous smaller ones that were not measured. (Appellant's Printed Rec., pp. 97-98). Below this, and in section 3, all the balance of the water of the river was diverted by another dam in that section (Appellant's Printed Rec., pp. 98-99). This last diversion was not made the subject of this contempt

proceeding. It will thus be seen that by these various methods the defendant was during this period taking practically all of the water of both forks of the river.

We will now proceed to show that each of the diversions complained of was in violation of the decree, and that the attempted justification thereof was without any foundation in law or fact.

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## I.

**THE LUIG DAM WAS DECREED TO BELONG TO LUIG AND WAS ENJOINED BEFORE MAY 15th, AND WHETHER HANLEY THEN HAD, OR SUBSEQUENTLY ACQUIRED AN INTEREST THEREIN, IT WAS SUBJECT TO THE DECREE AND ITS OPERATION IN VIOLATION THEREOF WAS A CONTEMPT.**

The decree, in the original case, found that this dam belonged to Luig, and he was permitted to use it at certain times only for the irrigation of certain land. The defendant W. D. Hanley put in no claim to it, or any right to irrigate any land by it, or any right to irrigate any land from the west fork of the river. He now claims that he owned it long before the original suit was commenced in 1899 or the final decree was entered in 1901, and the District Court held, first: that his claim of ownership was apparently without any foundation whatever, and, secondly, if he had any ownership or right in it it was his duty to set it up in the original case, and not having done so, he is barred from doing so at the present time, and from operating it at times not permitted by the decree. The testimony on this subject was as follows:

*John Gilcrest*, superintendent of plaintiff, testified that every year he went up and down the river to see if the

dams are in at any time they should not be in according to the decree, and that he had never known the Luig dam to be used for irrigating prior to the time permitted by the decree until the year 1915 (Appellant's Printed Rec., pp. 161-2).

*Ben Newman*, foreman of the plaintiff, testified that every year he went up and down the river for the purpose of ascertaining whether any dams were in during the time that the decree provides that the river shall be opened, and prior to the year 1915 he had never known of the Luig dam to be maintained in the river prior to the time allowed by the decree (Appellant's Printed Rec., p. 174).

The witness *Henry Luig* testified in regard to this dam as follows: The original Luig dam was put in by Sam Voegtly in 1886. The Luigs got it 2-3 years after. From that time until the death of Caspar Luig the Luig brothers used it, and since Caspar Luig's death Henry Luig used it. The new dam was put in in 1904, 1905 or 1906, and that was when Hanley first got an interest in it. (Appellant's Printed Rec., pp. 310-313).

The same witness further testified that neither himself nor Hanley had ever prior to the year 1915 operated the dam, excepting during the time allowed by the decree. His testimony on this subject was as follows:

Q. Now, Mr. Luig, ever since you have had charge of the property, you know when you put the boards in. What time of the year?

A. The 15th of April.

Q. The 15th of May, isn't it?

A. The 15th of May—about there, yes.

Q. Do you ever put the boards in before the 15th of May? A. Hanley fixed it.

Q. *Have you ever put the boards in before the 15th of May?* A. *No, I believe not.*

Q. Do you know when Mr. Hanley put the boards in the dam this year? A. No, I don't.

Q. Did you ever let him do that before?

A. I don't know.

Q. *Well, did you ever let him do it before this year?* A. *No, I didn't.*

Q. *Well, did he ever do it before this year?*

A. *No, he never done it.* (Appellee's Printed Record, pp. 155-6).

In the affidavit of Hanley in the contempt matter he states:

"The said dam was originally constructed by Peter Stenger for the purpose of irrigating section 31 from the waters of Silvies river, which section Stenger at that time had under lease from Charles Altschul, forming a part of what is known as the old Wagon Road Land Grant, and neither Stenger as lessee of said section nor Altschul as the owner thereof were parties to this suit, nor to the decree in question. I succeeded to Stenger in the lease of said section in 1898, according to my present belief, *but at any rate before the commencement of this suit and before the entry of this decree*, and succeeded to Stenger's interest in said dam in section 31 for the purpose of irrigating said section 31, and as before stated I was not made a party to this suit as lessee of said section 31, nor was Charles Altschul, the owner in fee simple. On July 1, 1903, the said section 31 was sold by the said Charles Altschul, by mesne conveyances, to the William Hanley Company, and during every year hereinbefore mentioned, to wit: from the time of the Peter Stenger lease long before this suit and this decree, the said dam has been used by the lessees or owners of section 31 for the irrigation thereof without the intermission of a single season until the present time. That about the time I ac-



quired the lease of section 31, *and certainly long before the commencement of this suit or the entry of this decree*. I constructed a new dam in the place of **the old Stenger dam**, which new dam is the dam **here in question** and which was referred to in the decree. Caspar Luig, the predecessor in interest of Henry Luig, *assisted* in the construction of said new dam *and was by me allowed*, in consideration thereof, a joint interest in said dam for the purpose of watering his holdings in section 6, particularly described in the complaint and the decree, towit: The east  $\frac{1}{2}$  of the SW $\frac{1}{4}$  and lots 6 and 7 and the SE $\frac{1}{4}$  of the NW $\frac{1}{4}$  and lots 3, 4 and 5, all of section 6, T. 24 S., R. 31 E.; and the said Luig also used said dam for the purpose of diverting water to irrigate other lands not mentioned in said decree and as I am informed and believe and so state and according to the best of my recollection such dam has so been used every year ever since said construction, prior to the decree, without intermission. I, therefore, state to the court under oath, as a purgation of the alleged complaint that in ordering the said Carey Thornburg to put the boards in said dam as charged in the first article of the complaining affidavit, I did what I had been doing continuously *long prior to the decree* and under the belief, as advised by counsel, that my right so to do and my right to continue to irrigating section 31 was a right of the William Hanley Company as successor in interest to Charles Altschul, the owner of section 31, and was in no wise affected by said decree." (Appellant's Printed Rec., pp. 33-4).

Mr. Hanley's testimony on this subject was as follows:

"Mr. Hanley, by the first article of the information against you in this proceeding, you are charged with aiding and abetting Henry Luig in taking water out of the west fork of Silvies river by means of what is known as the Luig dam, here so called, being in section 31, township 23 south, range 31 east, from the 15th of May till the 1st of July—no, about the month of April of this year. I wish you would state

whether you conspired with Luig or anybody else in this matter, or what interest Luig had in it?

A. I haven't seen Mr. Luig only about once in three or four years. I got some cattle of him this spring, but as far as this dam is concerned, he had nothing to do with putting the boards in and closing it up. This is not a Luig dam, it is the real 31 dam, and belongs to 31. Mr. Luig's right in this dam commenced, I would say, about 1900, that they helped me construct the present dam that is in there, as a matter of accommodation, additional right to the dam that they had down at their place. They had a dam at their house, about half way through Section 6, I think is where the Luig dam really is.

COURT. This dam then is your dam and not Luig's? A. Yes, it is the 31 dam.

COURT. *Did you claim it was your dam at the time?* A. *Well, I claim it now as my dam as the William Hanley Company, as the owner of 31.*

COURT. Section 31.

A. This dam originally, the construction of a dam in 31 commenced back in the latter part of the eighties.

Q. Who built it first? A. Pete Stenger built the first dam on 31.

COURT. Was that prior to this litigation?

A. Prior. About 1887, I think it dates. The litigation commenced, the commencement of this was about 1900.

Q. And from the Stenger ownership to what ownership did it pass?

A. It passed to me under lease.

Q. Well, you mean the dam under lease?

A. The section.

Q. Pete Stenger had 31 leased, did he?

A. Had 31 leased.

Q. From whom?

A. From the Willamette Valley & Cascade Mountain Wagon Road Company.

Q. What was the purpose of building this dam?

A. It was to spread the water on 31 to irrigate it.

Q. Was that its original purpose of construction? A. Yes, sir.

Q. Well, now, to Stenger you succeeded, as succeeding to his lease? Did I understand right?

A. Yes, to his lease.

Q. Was this dam that is in question here today the same identical physical dam that was there originally?

A. No, it is not. It is further down than the original dam.

Q. Well, when was this one put in?

A. This one was put in, I would say, in 1898.

Q. Before the decree?

A. Yes, before any litigation.

Q. This dam was in existence at the time of the decree? A. Yes.

Q. When did Luig get an interest in using water diverted by this dam? A. In 1898.

Q. For what consideration?

A. *Oh, just as a matter of assisting me in putting it in.*

COURT. How much of his land is watered from that diversion.

A. Why, I never followed that out in detail. As a matter of fact, he could irrigate all of it from it, because it would be above it. The gravity would irrigate all of it, but I wouldn't say how much of it does actually irrigate, but I think practically all of it.

Q. Well, now, so far as this contempt is concerned, the putting in of those boards in the month of April you assumed the entire responsibility of?

A. Yes, sir.

Q. And exonerate Luig? A. Yes, sir." (Appellant's Printed Record, pp. 184-188).

On cross-examination he further testified as follows:

"Q. When was the time you first got the control of this dam in 31? A. I think in 1898.

Q. And Mr. Luig was also using it then, was he?

A. Mr. Luig assisted me in putting it in.

Q. That was the first you had anything to do with it, when you put in this particular dam?

A. We were re-putting in a dam which was above, known as the old Stenger dam, which was specially the 31 dam.

Q. You put in a dam, as I understand it, at the very point where this dam is now, in Section 31, in 1898. Is that what I understand you to mean?

A. In 1898, I say that from memory.

Q. You say there had been an older dam at some other point? A. Yes.

Q. Where was that? A. It was above.

Q. How far above? A. Oh, a quarter of a mile.

Q. A quarter of a mile?

A. Between a quarter and a half, probably.

Q. That would be up very close—it is in the same section? A. All in the same section, yes.

Q. That had washed out, had it, or what?

A. Washed out.

Q. And which Mr. Luig helped you put this dam in, or which Mr. Luig did you help put it in, whichever it was? A. Caspar and Henry.

Q. They both worked on it, did they?

A. Partially.

Q. Had they had anything to do with the Stenger dam before that? A. I don't know as they had.

Q. Your understanding was that they had not, as I understand it?

A. Well, I would say that probably they had, and probably they had not.

Q. How did they come to help you, or how did you come to help them, whichever it was?

A. At our own initiative and suggestion that we put it in. I think that Caspar Luig that year rented the northeast quarter of Section 28, and he was rather a frequent visitor at the Belle-A Ranch, and we put it in that spring temporarily.

Q. You understood that he claimed a right there to the whole dam?

A. Yes, I understand that he has a right there.

Mr. Wood. You are talking about the old Stenger dam now? A. Well—



Mr. Wood. He is talking about the old Stenger dam.

A. I would put that more this way: that pretty near any of the neighbors that wanted a right, or an interest in any of those things, why, they could always have them.

Q. Was there any dam at this point where this new dam was put in, at the time you put it in?

A. No, there was no dam there then.

Q. Didn't you say in the opening of your testimony—

A. I don't know, Mr. Treadwell, but what maybe the first dam that we put in was higher up than where the present one is. I wouldn't be right sure.

Q. Have you rebuilt it since? A. Yes.

Q. When did you rebuild it?

A. I think probably the second year after we put it in.

Q. What year do you think that would be—about 1900? A. 1899.

Q. Well, didn't you say in your opening testimony that Mr. Luig had no interest in this dam until 1900?

A. Well, I don't know, Mr. Treadwell, *but Mr. Luig only has a neighbor's right in it.* That dam belongs to section 31.

Q. Well, I am asking you what you testified to. Didn't you testify, when you started off your testimony, about this Luig dam, that Mr. Luig's interest in that dam dated from 1900?

A. Well, I think Mr. Luig's interest in it dates earlier than that, because whenever we did do the first work, why he had an interest in it.

Q. You also think that he had an interest before you did the first work, in the old dam that you were replacing?

A. Oh, no. That dam serves two sections, you know, 31 and 5 is served from that dam.

Q. At any rate, your statement here that his first interest was in 1900 is not right? Is that right?

A. Well, I wouldn't say that, Mr. Treadwell. Whenever we done the first work together, Mr. Luig had a neighbor's interest in that dam.

Q. When did you rebuild it again, if you have rebuilt it since? A. No, no.

Q. So it was there in 1898? Then you rebuilt it again in 1899 or 1900? Is that as I understand?

A. Somewhere along there. I may be a year behind on my first statement.

Q. You know, don't you, that Mr. Luig all this time has been operating this dam under this decree, ever since that? A. No, Mr. Luig has not.

Q. He has not? A. No.

Q. Mr. Luig has never touched the dam, I suppose? A. Oh, he probably has.

Q. He probably has, or probably hasn't—which is it?

A. We haven't been restricted with this dam, and we haven't had any special time of putting it in. This dam has been put in by us, whenever we wanted to put it in.

Q. *You mean to say, Mr. Hanley, that ever since this decree has been entered, you have absolutely disregarded the decree as to this Luig dam?*

A. *Every year, Mr. Treadwell.*

Q. Every year? A. Every year.

Q. You just simply and absolutely disregarded the decree altogether?

A. Every year that dam has been put in by us, and it has had no care about dates. Now, it might have went some years way over—I don't know—because I have never given an order that this dam was under the decree at all.

Q. What land did it irrigate since that time?

A. 31 and 5. Now, I think to clear this thing up a little—

Q. You can't clear it up with me, Mr. Hanley, the least bit, except by answering my question.

A. Maybe I can with the court, Mr. Treadwell. I have a reason for disregarding that. I have a reason for disregarding it.

Q. I am asking you this question, Mr. Hanley: It irrigated the lower part of section 31 and section 6, did it not? Isn't that a fact? A. Yes.

Q. And section 5? A. Yes.

Q. You also own Section 5, don't you? A. Yes.

Q. We will come to that in a moment. Now, this dam is in very low, away down in the lower part of Section 31, is it not? A. Pretty well down, yes.

Q. About how much of Section 31 does the water that floods out from that dam irrigate?

A. Oh, that dam affects 31 two-thirds of the way up.

Q. Who operated the dam since the decree in this case? Who put the boards in?

A. Well, I wouldn't want to go back further than Mr. Thornburg, without giving it a little special thought.

Q. How long has Mr. Thornburg been employed by you there?

A. I would say just off-hand, about four years.

Q. About four years. And before that did you have anything to do with it at all? A. Oh, yes.

Q. Well, who operated the dam then?

A. I will try to work up that detail, if I will be given a little time.

Q. You can't work it up better than right now, for me, Mr. Hanley. A. Well, I haven't got it.

Q. Have you ever put those boards in that dam before this year yourself, outside of the time permitted by the decree?

A. Well, now, Mr. Treadwell, I will tell you. It has been a long time since I put in any boards, or did any such work.

Q. Well, you can answer that yes or no. We will get the rest of it?

A. I would say no.

Q. Have you ever been there and ordered it done before this year? A. Yes.

Q. Now, what year did you do that?

A. You mean right at the dam?

Q. Yes. A. Right at the dam?

Q. Yes, or that you know that the boards were put in at any time when it was not permitted by this decree?

A. Well, I don't know, Mr. Treadwell, that I can state any specific time. I have given an order on this dam that is regardless of any decree.

Q. You specifically told your people to disregard the decree so far as that dam was concerned?

A. No, I have not, no, sir.

Q. I want to know what you mean? A. No, sir.

Q. What did you tell them?

A. The only object in putting it in would be if we need water.

Q. What you are telling the court is that that dam has been used every year during the time that it was prohibited specifically by the decree in this case?

A. Well, that dam has been used every year, Mr. Treadwell—every year since the decree, and before.

Q. Why, sure. We all know that, Mr. Hanley.

COURT. That is again indefinite. I should think the time—

Mr. TREADWELL. Yes, the time is the whole thing.

Q. There is no question about this dam being used, Mr. Hanley, every year. I am asking you, has this dam been used before the time the decree permitted it to be used, on the 12th of May or the 15th of May, I believe it is, by this decree? That is what I am asking you.

A. *Well, I am not prepared to state right now, Mr. Treadwell, but I will say this to make it plain, that I did order the boards put in this year.*

Q. I know you did this year. A. Yes.

Q. But outside of this year, you wouldn't say that anybody violated this decree in regard to that dam? A. Oh, my, yes.

Q. You would? A. Yes.

Q. Well, now, who?

A. The violation, if it was not technical, it was in other way that we have been under the impression—that I have personally been under the impression



—and would give an order any time that we would put in the boards in the dam any time that we wanted water.

*Q. I am asking you the question: Can you state any person that ever put the boards in that dam before the time permitted by the terms of that decree, excepting this year?*

*A. Well, I won't state it now, Mr. Treadwell.*

*Q. You can't state it now, can you? A. No, sir."*

(Appellant's Printed Record, pp. 222-230).

It will be seen from this testimony that Gilcrest, the superintendent of plaintiff, Newman, the foreman of the plaintiff, and Luig, the owner of the dam, all testified that this dam had only been used in accordance with the decree until the year 1915, and that when the witness *Hanley* was finally pressed he was unable to testify that the boards had ever been put in the dam before that time in any year except that year.

Hanley now claims that he was a tenant of section thirty-one (31) from 1898 to 1903, when the William Hanley Company became the owner of the land (Appellant's Printed Rec., p. 33), and that ever since it has been the owner of the land and claims that he acquired his interest in this dam while a tenant in 1898. He set up his right as tenant in land on the *east* fork (Appellant's Printed Rec., p. 5), but did not set up any right in this dam. If he had any right in this dam acquired while lessee, such right was his own property and not the property of the owner of the land, and he was entitled to set it up and have it protected, and it is doubtful whether such a right

ever became appurtenant to the land or the property of the owner of the land.

*Smith v. Duff*, 23 Mont. 65, 24 Mont. 30;

*Cooper v. Shannon*, 36 Colo. 98, 85 Pac. 175, 111 L. R. A. 95;

*Sayre v. Johnson*, 33 Mont. 15; 81 Pac. 329;

*Seaward v. P. L. S. Co.*, 49 Or. 157, 88 Pac. 963;

2 *Kinney on Irr. & Water Rights*, Sec. 689.

If he failed to set it up he would be barred as tenant from asserting it.

*Josslyn v. Daly*, 15 Idaho 137; 96 Pac. 568.

The evidence showed that the so-called Stenger dam was half a mile further up the river than the Luig dam, although Hanley tried to make it appear that Stenger built the Luig dam, and Luig testified that Hanley had nothing to do with the Luig dam until after the William Hanley Company purchased section thirty-one (31) (Appellant's Printed Rec., pp. 311-12). From the time of the decree until 1915 the dam was operated in accordance with the decree according to all the witnesses. Under these circumstances, the court was fully justified in holding that his claim of title to this dam prior and superior to the decree was without any substantial foundation, and that any right that the William Hanley Company has it got by helping in the reconstruction of the dam in 1904, and that it therefore took its interest subject to the decree.

*Ahlers v. Thomas*, 24 Nev. 407; 56 Pac. 93;

*Lake v. Superior Court*, 165 Cal. 182;

*Batterman v. Finn*, 34 How. Pr. 108;

*State v. Dist. Court* (Mont.) 86 Pac. 798.

Moreover, if Hanley did acquire any interest in the dam before the decree, and the owner of the land subsequently obtained that title, it obtained it from Hanley, and if Hanley's title was subject to the decree by reason of the fact that he was a party to the suit, it remained subject thereto when it passed to the owner of the land. This entirely distinguishes the case from the case of

*Josslyn v. Daly, supra.*

In that case the original water right was acquired not by the tenant, but by the owner of the land, and it was sought to bind the tenant who subsequently became owner, by a judgment against him, while tenant. It would be ridiculous to say that the landlord would get a better title to an improvement, such as a dam, put upon the land by the tenant, than the tenant himself had, and although the tenant held his title thereto subject to agreement or decree, that the landlord by operation of law would succeed to it free of such limitation.

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## II.

**THE YOUNG DAM COMPLAINED OF IN THIS CASE WAS BUILT AND OPERATED IN VIOLATION OF THE DECREE AND ANY INTEREST THAT THE DEFENDANT HANLEY HAS IN IT HE ACQUIRED WITH THE KNOWLEDGE THAT IT WAS SO BUILT AND OPERATED.**

It will be noted that the decree permits the maintenance of the Young dam for the joint use of the Young property, the Hotchkiss property and the Voegtly property (now the Thornburg property). The dam referred to in the decree was situated about one thousand (1000) feet south

of the north line of section thirty, whereas the ditches above it took out near the north line of section thirty. It appears that in about the year 1907 George W. Young abandoned the old dam and constructed a new dam on the north line of section 30 and this matter became the subject of a contempt proceeding against him, which Judge Bean decided the first day of April, 1912, and in his opinion Judge Bean said:

“There is another feature in reference to Young’s conduct that ought not to pass unnoticed, although it is not specifically charged as a violation of the decree in the petition filed. His dam went out in 1907. About that time or shortly before he built another dam at the expense of Hanley near his north line and some distance above the old dam, and constructed a new ditch along his north and east line and onto section 29, throwing the dirt therefrom on his side of the ditch, making a levee or embankment to prevent his land from being overflowed. He used a part of the water through this ditch for irrigation and permitted the remainder to go down to Hanley’s land, and this he clearly had no right to do under the terms of the decree. He claims that since the decree he has changed the character of his cultivation and uses only about 25 per cent as much water as he did at the date of the decree, and he seems to think he had a right to permit Hanley or some one else to use the remainder without violating the decree. But, as already stated, his rights are defined in the decree. By it he is not entitled to any definite quantity of water but only sufficient to irrigate the described lands, and if by reason of a change in the character of his cultivation he now uses less water than he did at the date of the decree, he must let the surplus go down the stream as it is wont to flow, and cannot permit its use by another without violating the decree.” (Appellant’s Printed Rec., p. 336).



The defendant *Hanley* in his affidavit filed in answer to the order to show cause herein made the following statements in regard to the Young dam:

“II.

Answering paragraph II of the complaining affidavit, I say as before that I have never had any conversation with George Young, Hull Hotchkiss, C. H. Voegtly, or any of them, as to their management of the dam referred to in the affidavit, or diversion of water from Silvies river this year, and have neither directly nor indirectly encouraged them to any violation of the decree, or to any act whatever in the premises. That while I wish to be emphatic in the foregoing statement that I have neither directly or indirectly, nor by advice or encouragement, taken a drop of water from Silvies river this year by said Young dam, I wish to be entirely frank with the court and state that I consider myself the actual owner of said dam by purchase from Young, and I purchased said dam for the purpose of using it to divert water from the river to irrigate section 29, and section 29 stands in exactly the same category and relation as section 31 referred to in the preceding article, namely, it is a Charles Altschul or Wagon Road section, which was in no way involved in this suit or this decree, and has since this decree by mesne conveyances been acquired by the William Hanley Company. *That until yesterday, the 29th day of April, 1915, when the complaining affidavit was served upon me in Portland, Oregon, I had no knowledge of the Geo. W. Young contempt proceedings, or that he had been ordered to remove said dam or purge himself of contempt by paying costs. I am advised by counsel that the said decree in the contempt proceedings against said Young does not specifically require said Young to remove said dam, but only to refrain from obstructing the flow of the river except as permitted by the decree, and to pay costs. However, to make this point absolutely clear, I wish*

*to repeat that though I purchased the Young dam in good faith and in entire ignorance of any decree against it or Young, I have not used it, nor incited anyone to use it, and did not know it had been used this year.*" (Appellant's Printed Rec., pp. 35-36).

It will be noticed by this that Hanley there claimed that after Young had built the dam he, Hanley, had purchased the same from him, *and at that time he had no knowledge of the contempt proceedings against Young, that he purchased it in good faith, and in entire ignorance of any decree against it or against Young.* When as a witness, however, Hanley testified just to the contrary and admitted that when he purchased it Young told him "that he had been held for contempt." His testimony on the subject was as follows:

"Mr. Young said that he had got some hay from me and that he was going to take it out, and if I would square off his hay bill, that he would turn me over his interest in the dam, that he didn't expect to use it any more, *that he had been held for contempt*, or something about it, but he said if I didn't take it, why he would take it out. So that I squared off his hay bill, and taken his interest in the dam."

(Appellant's Printed Rec., p. 189).

On cross-examination he further testified on the same subject as follows:

"Q. Now, as I understand it, this statement in your affidavit is entirely unfounded where you state that until yesterday, the 29th of April, 1915, when the complaint was served upon you in Portland, Oregon, you had no knowledge of the George W. Young contempt proceeding, or that he has been ordered to remove said dam, or purge himself of contempt by paying costs? That is not so at all, is it, that portion of your affidavit?

A. It is not so.

Q. No, I say that is not true there? You don't contend it to be, do you?

A. I want to be understood as saying that I did understand that Young was held for contempt of court.

Q. I just want to get the record clear. You state now that that is not right?

COURT. I understand now you made a mistake in that affidavit?

A. Yes, sir; in the allegation, I didn't aim to say that I had no knowledge of the Young contempt."

(Appellant's Printed Rec., p. 236).

When Young, however, took the stand he testified that he built the dam in 1907 and Thornburg made a ditch taking out above it and Young built a flume connected with it, and also constructed a ditch connected with it on the opposite side of the river, and that he built it with the intention of using it and tried to use it (Appellee's Printed Record, pp. 97-106); that he gave Hanley the privilege of connecting with it (Appellee's Printed Rec., p. 106), and that some of Hanley's men assisted him in building it (Appellant's Printed Rec., p. 302), and that he made his deal with Hanley with regard to it before the previous contempt proceeding (Appellant's Printed Rec., pp. 304-5). After this testimony Hanley again took the stand and gave an entirely new version of the matter, as follows:

"Mr. Hanley, in your affidavit is a statement that you didn't know of the contempt proceeding against the Young dam when you purchased it. Then you took the stand and, as I understand it, you testified that you knew, in a general way that there had been contempt proceedings. Then you said that you had taken over Young's interest in the dam, or some hay account. Now, I understand from Mr. Young's testimony that you took over the dam earlier than that,

and before the contempt proceedings. Having heard him, is your memory refreshed so that you can state anything more definitely about the facts?

A. Mr. Young said that I had taken it over in 1909, and refers me to Mr. Billie Miller, my attorney at the time, that he had taken a bill of sale, and there is a bill of sale of it recorded in the records of the county clerk's office at Burns. Now, I would say that I want the court to understand that my interest in that dam is for Section 19, and the rights that I claimed for Section 29. They corner with one another. And in the part of constructing it, why, I guess probably I had an interest in it. But at any rate, I had paid a matter that Mr. Young had told me, and refreshed my memory on it, and that was some money that he was owing on the lease of Section 29, that I had paid that. And I remember paying that to the Road Company, and probably in my hay statement, that was an overplus of another payment, and I probably put in something when the dam was constructed. But the dam was moved up to Section 19, and the rights in there I claim for Sections 19 and 29, I claim for the Harney Valley Improvement Company." (Appellant's Printed Record, pp. 307-8).

It will be seen from this that Hanley made three different and distinct explanations about this dam, and the court, of course, was at liberty to accept any one of them that it saw fit. But however it may be, it appears that this dam was built by Young in place of his dam which had gone out, and built at a place where he was not entitled to build it, and in a manner that diverted water into the Hotchkiss ditch that was not permitted by the decree, and whether Hanley originally assisted him in doing this or, after he had been held in contempt for doing it, attempted to purchase it from him, he was in either event assisting in a violation of the decree of the



court against Young, Hotchkiss and Thornburg, and the case was a clear case of Young having been found in contempt when building the same, attempting to avoid both the contempt and the necessity of removing it by passing it over to Hanley. It is too clear for argument that this dam having been constructed by Young for his own purposes in violation of the decree of the court, and this being known to Hanley, who was a party to the suit, that he could acquire no rights in and to the same, and the court therefore properly required Young to remove it, and Hanley to desist from using it. It is obvious that a person cannot build a dam in violation of a decree and then transfer it to another to escape the consequence, nor can such transferee escape liability for a violation of the decree by its subsequent maintenance.

*Ahlens v. Thomas*, 24 Nev. 407; 56 Pac. 93;

*Lake v. Superior Court*, 165 Cal. 182, 193; 131 Pac. 371;

*Batterman v. Finn*, 34 How. Pr. 371;

*State v. Dist. Court* (Mont.), 86 Pac. 798.

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THE ORDER APPEALED FROM DOES NOT INTERFERE WITH ANY NEW RIGHT OF PROPERTY WHICH HANLEY MAY HAVE ACQUIRED SINCE THE DECREE; IT SIMPLY UPHOLDS THE DIGNITY OF THE COURT BY INSISTING THAT ITS DECREE RESPECTING THESE PARTICULAR DAMS CANNOT BE EVADED OR THWARTED BY ANY PARTY TO THE SUIT WHO THEN HAD OR HAS SINCE ACQUIRED AN INTEREST THEREIN.

The decree to which Hanley was a party having expressly forbidden the operation of either of these dams prior to the 12th day of May, and the 15th day of May,

respectively, a violation of that decree by any person having notice thereof whether a party to the decree or not would constitute a contempt.

*United States v. Debs*, 64 Fed. 724, 755;

*Ex parte Sticking*, 40 Ala. 160.

Nor is any question involved in this case regarding any new and independent water right which any party may have acquired since the decree was entered. If Hanley has since the decree acquired any new and independent water right for new land which he did not own at the time of the decree, there is nothing in the order herein appealed from which in any way affects such right. But such rights must stand on their own bottom. If by appropriation, they must be based on application to the state engineer. But these particular dams having been dealt with by the decree no right in them can be acquired contrary to its terms. For instance, the evidence is undisputed that the water from the Luig dam went all over the Luig land. (Appellee's Printed Rec., pp. 9-10, 36-7), and the Young dam put water all over the Thornburg and Hotchkiss property (Appellee's Printed Rec., pp. 11-12, 36). It, therefore, results that by the simple artifice of saying Hanley put in the boards these parties can get their lands flooded in the very teeth of the decree. While Hanley was a party to the suit, even if he had not been, he would be bound to respect the judgment of the court and not thus thwart the purpose of the court.

“It is entirely consonant with reason, and necessary to maintain the dignity, usefulness and respect of a court, that any person, whether a party to a suit or not having knowledge that a court of competent jurisdiction has ordered certain persons to do or ab-

stain from doing certain acts, cannot intentionally interfere to thwart the purposes of the court in making such order. Such an act, independent of its effect upon the rights of the suitors in the case, is a flagrant disrespect to the court which issues it, and an unwarrantable interference with and obstruction to the orderly and effective administration of justice, and, as such, is and ought to be treated as a contempt of the court which issued the order.'"

*Chisolm v. Caines*, 121 Fed. 397, 400.

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**THE CLAIM OF HANLEY IN THE LUIG AND YOUNG DAMS WAS  
A MERE TRANSPARENT DEVICE TO ENABLE THEIR USE  
CONTRARY TO THE DECREE.**

The Luig dam is in the extreme lower end of the Hanley land and the water diverted by it went all over the Luig land (Appellee's Printed Rec., pp. 9-10, 36-7). The water diverted by the Young dam went to the west onto the Hotchkiss and Thornburg land (Appellee's Printed Rec., pp. 11-12, 36), and not to the Hanley land and the only way that the water could get to Hanley's section 29 would be through the Young ditch and Young testified that he would not let Hanley use it (Appellee's Printed Rec., p. 104). Still Hanley says he had water from the Young dam for twelve years (Appellee's Printed Rec., p. 62), although he had before testified that he did not get an interest in it until after the contempt proceeding in 1912, and Young said Hanley got his interest in 1909, when it was constructed. His final testimony as to this dam was that Young constructed it and

"I think probably that I was some party to it myself. That is, that I put in, but I am not just prepared to testify. These little minor matters slip away from me." (Appellee's Printed Rec., p. 62).

And both in his answer and testimony he denies using it at all in 1915 (Appellant's Printed Rec., pp. 35-6). It therefore appears that it was built in violation of the decree and used in violation of the decree by Young, Hotchkiss and Thornburg, was held to be in violation of the decree in 1912, and is again used in violation of the decree in 1915, and then comes Hanley and asks the court to protect the interest he obtained in it either when it was illegally built or after Young had been held in contempt for building and maintaining it.

"A party to a decree adjudicating the right to certain waters and enjoining interference with such rights, is properly convicted of contempt for using more water than allowed under the decree, his claim being that he acquired the right to such use by deed from one not a party to the decree, *the evidence failing to show any right in his grantor, or that his claim is made in good faith, and it being found that his claim is a mere attempt to evade the decree.*"

*Simpson v. Holbrook* (Wash.), 58 Pac. 206.

See also:

*State v. Lavery*, 31 Or. 77.

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### III.

**WATER DIVERTED BY HANLEY TWENTY-ONE DAM INTO THE TWENTY-ONE DITCH BY MEANS OF THE TWENTY-ONE DAM AND OTHER OBSTRUCTIONS WAS IN VIOLATION OF THE DECREE.**

The evidence in this matter shows that forty feet of water was diverted in this manner in April (Appellant's Printed Record, p. 94), and this was caused by a board and brush in the dam (Appellant's Printed Rec., p. 95),



whereas the defendant was not entitled to divert any water by means of the dam until the 5th of May. The court had a perfect right to believe the testimony that not only this board but the brush were deliberately placed in the dam as testified to by the witness. The evidence also showed that on the 4th of May, the day before the defendant was entitled to use the dam, all the boards were placed in the dam (Appellee's Printed Rec., p. 50). Further, as showing the intentional character of these obstructions, it appears the skeleton of an old bridge was permitted to fall and remain in the river on the Hanley property, causing the water to flow out of the river (Appellee's Record, pp. 26-27) and likewise boards with wires attached to them were permitted to lodge in the river with the same effect (Appellee's Record, p. 28), to say nothing of numerous dead cattle that were permitted to lodge in the river and help the work along (Appellee's Printed Record, pp. 29-31). Of course the defendant had lots of explanations for all of these obstructions, but the court was not bound to accept them, and the fact remained that during the months of March and April he was enabled by means of the Twenty-one dam and the board and brush cut and placed in the same to divert forty cubic feet of water, in clear violation of the terms of the decree.

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#### IV.

#### **THE KEEPING OPEN OF THE DRAIN DITCH AND THE DIVERSION OF WATER THROUGH THE SAME WAS IN CLEAR VIOLATION OF THE DECREE.**

It will be noted by the final decree in the original case that defendant Hanley was permitted to use the drain ditch "for the purpose of draining water from the surface

of the land above described, and not for the purpose of irrigation." It appears that since the entry of the decree, Hanley having consistently left the drain ditch open and taken water at all seasons of the year, a supplemental suit was brought against him, which finally reached this court and is reported in *Pacific Live Stock Co. v. Hanley*, 200 Fed. 468. As to the matter of the drain ditch this court said:

"With respect to the drain ditch, counsel for the appellant insist that it is and has been kept open by Hanley at all stages of the river 'draining even the stock water away from the complainant at the lower stages of the river,' and that it practically diverts the main body of the water of the east fork of the river at all times, except when the water of the river is high.

Recurring to the original decree, we repeat the provision in respect to the drain ditch. After conferring, in its eleventh subdivision, upon Hanley the right to maintain his dam in the east fork of the river on section 21 and to divert such quantity of the water thereof at that point as is necessary for the irrigation of the lands therein specifically described, the original decree proceeds as follows:

\* \* \* \* \*

Here is express authority for the maintenance of the drain ditch as then constructed from the east fork of the river extending southeasterly across the S.  $\frac{1}{2}$  of section 27 to the land of the complainant company at or near the S. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 26, township 23 S., range 31 E., Willamette meridian, for the purpose of draining water from the surface of the lands of Hanley therein specifically described, and an express inhibition against the use by Hanley of any of the water of the drain ditch for irrigation purposes that is thereby taken from the river; the next clause of the same subdivision of the original decree providing, in effect, that at any time

the dam of Hanley in the east fork of the river on section 21 is open, and does not obstruct the flow of the water thereof, if 'from natural causes the waters of said east fork of Silvies river shall overflow its banks upon the land of the said W. D. Hanley, or naturally run through either of the ditches of the said W. D. Hanley leading from the dam of the said W. D. Hanley first above described (the dam on section 21) said defendant W. D. Hanley shall have the use and enjoyment of so much of the said water of said river as may come upon his land in the manner aforesaid, and during such time as the same may run thereon from natural causes and without obstruction of the channel of said river.'

It is manifest, therefore, that such overflow waters of the east fork of the river as may come upon Hanley's land while his dam is open and does not obstruct the natural flow of the river he is expressly given the use and enjoyment of, and while he is expressly inhibited from using the drainage ditch on section 27 for irrigation, or for any other purpose than of the drainage of the surface water from the specifically described lands, no other limitation is imposed in respect to the ditch or ditches through which he may use and enjoy such overflow waters from the east fork of the river.

The original decree, however, permits the maintenance by Hanley of his drain ditch for drainage purposes only and for the purpose of draining water from the surface of only certain specifically described lands of his. Beyond that limited purpose he is by that decree expressly enjoined from maintaining or using that ditch or any of the waters thereof; and it necessarily follows that neither Hanley nor his successors in interest have any right to thereby divert any water from the river when its waters are not so high as to make it necessary or proper by means of the drain ditch to drain surface water from the lands specifically described in the eleventh subdivision of the original decree.

*That Hanley clearly violated the provisions of the original decree by subsequently constructing in the drain ditch a stopgate and an outlet or tapgate by means of which he used some of the waters of that ditch for irrigation is shown by the testimony of Hanley himself, as well as that on the part of the appellant. The claim on his part that such acts were committed with the consent of the appellant, and resulted in no injury to it, was presented to and considered by the judge who rendered the original decree when Hanley was cited to show cause upon that, and other grounds, why he should not be punished for contempt. Subsequent to those proceedings and long before the commencement of this suit, the evidence shows he removed the stopgate from the drain ditch, and never thereafter used any of the water of that ditch for irrigation, but the evidence fails to show that he ever has removed from the said ditch the outlet or tapgate, which he must be compelled to do.*

*A careful consideration of the evidence further shows in our opinion that Hanley has, notwithstanding the provisions of the original decree, kept, and continues to keep, the headgate of the drain ditch open at low stages of the water of the east fork of the river and at times when it was, and is, not necessary or proper to be kept open for the purpose permitted by the original decree, and in so doing has committed and does commit a clear violation thereof.*

The defendant Hanley attempted to justify his diversion by the contention that by taking the water out of the river into the drain ditch and away from the complainant he was draining water from the surface of his land, for the reason that if he did not take it out it would overflow his land below the drain ditch. The insincerity of that claim was pointed out by this court in the language we have just cited, and the absolute lack of foundation for it is pointed out by the trial judge in this proceeding,



and the insincerity of the plea is pointed out particularly by reason of the fact that at the very times he was claiming to drain the river through the drain ditch for the purpose of preventing his land from being submerged, he was himself doing everything possible to submerge it to the extent of taking all of the water of both forks of the river; but, moreover, in this matter the defendant himself, by his own answer, has deprived himself of the possibility of contending that the diversion of thirty feet of water through the drain ditch clear up to the 8th of April could be justified on the ground that the land needed drainage at that time. In the affidavit filed in response to the order to show cause (Appellant's Printed Record, pp. 37-8), the defendant Hanley denied that the drain ditch was open after the *middle of March* and there is no suggestion made that after that time there was any flood condition which required the drain ditch to be kept open, and he followed up this affidavit by calling witnesses and attempting to prove that the drain ditch was not in fact open and did not in fact divert any water after the middle of March. Fortunately, we not only had the testimony of Mr. Griffing, who testified that it diverted water until the 8th of April (Appellant's Printed Rec., pp. 93-4), but we also had photographs taken by Mr. Griffing showing this diversion (see Exhibit No. 8, Appellant's Printed Record, pp. 99-100), and Mr. Griffing testified that this photograph was taken on the 8th day of April, and he did not even purchase the camera with which he took the picture until after the first of April; so that Mr. Hanley's statement that no water was diverted into the same after the middle of March could not be correct (Appellant's Printed Record, p. 100).

It therefore necessarily results that the trial court properly said in this matter, as this honorable court said in the former appeal, "that Hanley clearly violated the provisions of the original decree," and that "in so doing has committed and does commit a clear violation thereof" (200 Fed. 484-5).

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## V.

### THE DIVERSION OF WATER BY CUTS IN THE BANK OF THE RIVER IS IN VIOLATION OF AND AN EVASION OF THE DECREE.

The injunction against diverting any of the water of Silvies river, except as permitted by the decree, is unlimited in its language, and applies to a diversion made "in any manner" (Final Decree, paragraph 19, pp. 1179-80). It is true that the decree permits Hanley to enjoy the water which from natural causes "shall overflow its banks." Hanley himself recognized that, however these cuts may have been caused, they could not be justified, nor could water flowing through them be said to be overflowing the banks. Thus, he said, that he had men working "with special instructions to keep those gaps closed up" (Appellant's Printed Rec., p. 200). He denied completely the existence of the cuts shown by the photographs and said that if there was any place where the water could run out in a channel it would merely be "some little nicks where it would cut, but I have no knowledge of any such a place being on the river; and if it were, why, it was just because it had broken itself out. \* \* \* The man that was down there had full instructions to close them up and I have brought him here as a witness" (Appel-

lant's Printed Rec., p. 200). He further testified that if there were any shovel marks they were made by filling up instead of opening the cuts (Appellant's Printed Rec., pp. 201-2), and he stated that "we aim to use the river so it will work out *evenly on the top of the banks* and regulate the quantity of water that works over the bank" (Appellant's Printed Rec., p. 204), showing clearly that water running out through such cuts would not be considered as water "overflowing the banks."

The "banks" are the elevations of land which confine the waters to their natural channel when they rise to the highest point at which they are confined to a definite course and channel. (Kinney, Sec. 305). A cut or break in the bank cannot be the bank.

Hanley further testified that he had a man working along the river for the purpose of keeping the breaks filled up, and, referring to the picture showing one of them filled up with boards and manure, he stated it was very much exaggerated, and that that was only an emergency method of stopping them, and they had a better method which they used, namely, filling them up with scrapers (Appellant's Printed Rec., pp. 249-250), and so strongly did defendant admit his duty to keep these gaps closed that his counsel inquired whether we objected to his doing so (Appellant's Printed Rec., p. 256), and he also produced the witness *McLaren*, who testified that it was his duty to keep these cuts in repair, and went around with scrapers for that purpose (Appellant's Printed Rec., p. 277); and also the witness *Ryan*, who apologized for the method of stopping these shown in the photographs, which he said was merely a temporary structure, and ex-

plained how he closed them by putting poles across, and put in stack bottom to prevent the water from running out (Appellant's Printed Rec., p. 285-8), and he also testified to putting in boards for that purpose (Appellant's Printed Rec., p. 293), and that Mr. Hanley told him to close them up about the third or fourth of April (Appellant's Printed Rec., p. 295). The witness *Dave McLaren* attempted to give testimony to the same effect.

Again, *Hanley* testified that he closed all these cuts in the early part of April, and still a photograph was taken on April 20th, showing fifty feet of water flowing through one of them (Appellant's Printed Record, pp. 101-2). *Griffing* also testified that they showed evidence of design (Appellant's Printed Rec., p. 137), and that the water would not naturally wear them in the meadow sod (Appellant's Printed Rec., p. 138), and that he mentioned these cuts to Mr. Hanley's foreman, Mr. McLaren, and he said they "formed part of their irrigation system" (Appellant's Printed Rec., p. 139).

It is perfectly clear, therefore, from all of this testimony that the whole object of the defendant was to admit his duty to keep them closed and to establish that he had performed that duty, and that no water had gone out through them.

It is, therefore, very clear that Hanley himself recognized that, however, these cuts may have been caused, their maintenance was unjustifiable. While he attempted to establish that they were caused by water breaking through, of course, in view of the artificial operation of dams, ditches and irrigation works it would be pretty difficult to say what constituted a natural and what an



artificial break, and, for that matter, it is well settled that persons having rights on a stream are entitled to have even such natural breaks repaired and the river kept in its channel (Farnham on Water and Water Rights, sec. 489, et seq.). But Mr. Griffing testified that the openings had the appearance of being cut (Appellant's Printed Record, p. 97), and the photographs in evidence showing them controlled by stakes and manure show that instead of being permanently closed as they should have been, they were kept so that they could either be opened or closed at the will of Hanley. (See also Appellant's Transcript pp. 150-151.) Another one of these so-called cuts is described as a ditch (Appellant's Transcript, p. 97), and the photograph of it fully justifies that characterization.

*Gilcrest* testified that by these openings Hanley diverted water "in excess of any earthly necessity" (Appellant's Printed Rec., p. 164), and that these cuts "were not as the banks were originally. The sod was broken. There were openings there" (Appellant's Printed Rec., p. 170).

In connection with these cuts counsel refer to some testimony by a witness named Cronin, not contained in the printed record on this appeal, but claimed to be given in the trial of the original case, in which he refers to an opening in Section 34, and says he thinks it is a natural opening. That testimony not being part of the record on appeal, we have not got it before us, but it is sufficient to say that that is not upon the Hanley land and is not one of the cuts involved in this proceeding.

It is clear from this that the court was fully justified in holding that the manner in which these cuts were

operated was a mere evasion of the decree, and was a violation of the injunction which forbade the diversion of water from the stream in any manner whatever, except in the particular ditches authorized by the decree.

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**THE ENTIRE ATTITUDE OF THE DEFENDANT IN THIS MATTER  
SHOWED A DESIRE TO EVADE AND TRIFLE WITH THE  
COURT AND THE DECREE.**

When this contempt proceeding was inaugurated and the order to show cause served, Hanley immediately came to Portland and had himself interviewed in the "Oregon Journal," in which he vilified the complainant, and, while he was taking all of the water of the river, he claimed that he was being harassed by "litigation in the United States courts" (Appellee's Printed Rec., pp. 44-46).

Although George Young had been held in contempt of court for constructing the new Young dam and flume connected with it, Hanley declared that it was an "outrage to cite the poor settler for contempt" (Appellant's Printed Rec., p. 231). He first attempted to deny that the court had ever entered any decree in the original case, but that it was only an agreement (Appellant's Printed Rec., p. 220). He talked about irrigating "these few acres" (Appellant's Printed Rec., p. 242), and then further on admitted that he owned ten thousand acres of land (Appellant's Printed Rec., p. 208), and attempted to make the court believe that he thought we were complaining because he shut up the drain ditch, although the records of this court show that we have been fighting because he keeps it opened (Appellant's Printed Rec., p. 239); claimed that he was entitled to keep the drain ditch open

so as to keep the water from overflowing his land, and still refused to improve the channel of the river so it would not overflow his land (Appellant's Printed Rec., p. 160). In his affidavit and answer to the order to show cause he complained because the complainant had never made any complaint to him with regard to the matters covered by the contempt matter, and that

"if the facts were true the obstruction of the overflow of the river would be petty and immaterial, and nothing which could not be quickly remedied and removed without going into court by simply calling my attention to the matter,"

and that he did not have "the slightest suspicion that the complaints here charged in this affidavit were being harbored against me."

These allegations, all put in his affidavit evidently for public consumption, were made notwithstanding the fact that on the hearing he attempted to justify practically all of the things charged against him, and the evidence was without contradiction that before the contempt proceeding was inaugurated the matter was in great detail called to Mr. Hanley's attention (Appellant's Printed Rec., pp. 143-149).

Referring to such a matter as the taking of fifty feet of water, he says:

"We haven't been *technical* about the use of the water in all those *little details*; but we haven't *taken* out the water at that place there that *naturally* would have run out, if we would have been technical about *trying* to get it out."

He first attempted to state that ever since the decree regarding the Luig dam "I have given an order on this

dam that is regardless of any decree," attempting to convey the idea that he had every year since that time used it at times forbidden by the decree, but when finally pressed the best he could say was that "I did order the boards put in this year" (Appellant's Printed Rec., pp. 228-229). This is a good deal like the boy who said he saw a thousand cats on the back fence, and on closer questioning finally brought it down to his cat and the neighbor's cat. In regard to the Young dam, in his affidavit and answer to show cause he specifically swore that he purchased it without any knowledge whatever of the contempt proceeding against Young, and then afterwards admitted that he purchased it because Young had been held guilty of contempt in respect to it.

As to the Luig dam, instead of belonging to Luig he attempted to contend that it belonged to him and that Luig merely assisted him in building it in 1898 (Appellant's Printed Rec., p. 187), while Luig testified that he and his brother had owned it ever since 1886 and Hanley had nothing to do with it until 1904. He even attempted to work out an interest in the People's Ditch (Appellee's Printed Rec., pp. 71-2), but later he admitted that he had no such right at all (Appellee's Printed Rec., p. 73), and he admitted that the water that went out through that ditch went to his land, and that he directed his foreman to use it for the irrigation thereof (Appellee's Printed Rec., pp. 70-72). Everyone who was interested in the People's Ditch denied that they had opened it.

The court was, therefore, fully justified in coming to the conclusion that Hanley's attempt at this late date to claim rights in the Luig dam was about as substantial as



his claim in the People's Ditch, and that it was simply made for the purpose of laying a foundation for a claim of water right for a lot of road land recently acquired by him; at any rate, none of his testimony was of such a nature as to require the court to believe it or follow it as against other testimony in the record.

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**THE DECISION OF THE TRIAL JUDGE AS TO THE FACTS IS CONCLUSIVE IN A CONTEMPT MATTER AND NOT SUBJECT TO REVIEW.**

*Bessette v. W. B. Conkey Co.*, 194 U. S. 234; 24 Sup. St. 665; 48 L. ed. 997.

The jurisdiction of the court below is alone subject to examination.

*4 Ency. Pleading & Practice*, p. 814.

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**MISCELLANEOUS MATTERS IN REPLY TO BRIEF FOR APPELLANT.**

The foregoing brief anticipates and covers most of the matters referred to in the brief filed by appellant, but a few special matters therein deserve special mention:

1. Counsel state that the Luig dam was put in by Pete Stenger in the eighties. The evidence is not at all to that effect. The evidence is that Pete Stenger at some time in the eighties put in a dam on section 31, and that that was half a mile above the Luig dam. The Luig dam was put in first by Voegtly, and then in the eighties acquired by Luig, and, according to Luig's testimony, remained his undisputed property until 1904, when it was rebuilt and Hanley given an interest in it. How long the

Stenger dam remained in the river between the time it was put in the river and the time that Hanley acquired an interest in the Luig dam, in 1904, does not appear, but when the original suit was commenced and tried in 1899 and 1900 maps were introduced in evidence, which are on file in this court, showing all of the dams in the river, and this Luig dam is there shown, but no such dam as the Stenger dam appears, and it is, therefore, entirely consistent with the record to assume that the Stenger dam was a temporary matter; that it was out of the river for years and that Hanley first acquired his interest in the Luig dam about 1904, when it was rebuilt.

Counsel further attempt to contend that the Luig dam in section thirty-one is not the Luig dam mentioned in the decree. The decree locates the Luig dam in section thirty-one (Decree, p. 1153). The trouble is that the so-called Stenger dam is an entirely different dam from the Luig dam, which is involved in this proceeding.

2. Appellant claims that the water rights appurtenant to section thirty-one belong to the owner of that land and were acquired by the William Hanley Company, successor in interest of William Hanley (Appellant's Printed Rec., pp. 237-8), and were not involved in the original suit, and that even if Hanley's interest as lessee was involved, his interest as owner was not so involved. We in no way dispute this contention. Whatever *water rights* section thirty-one ever had appurtenant to it, it still has, but the question here involved is not the water rights of that land, which the court has in no way attempted to determine or interfere with, but the ownership of this Luig dam. There has been no evidence whatever

introduced showing any ownership of this dam appurtenant to section thirty-one prior to the entry of the decree in this case, and any right which either Hanley or the William Hanley Company obtained in that dam after the decree was acquired with notice of the decree, and held subject to its terms. In fact, the William Hanley Company by supplemental proceedings was made a party to this suit, and it is simply another name for William Hanley, and there is nothing in the record showing that C. E. S. Wood or any one else has any interest in it. That, however, to our minds, is an entirely immaterial factor. The court having dealt with this particular dam, and having had before it the owner of the dam, Caspar Luig, any interest subsequently acquired by the William Hanley Company, or any one else, is subject to its decree, and it is folly to say that the interest was not obtained from Luig. If he owned it and gave Hanley an interest in it in consideration of his helping to rebuild it, he did acquire his interest from Luig.

Counsel say that they could themselves build another dam for the irrigation of section thirty-one. Whether they could or could not with the permission of the State Engineer, they would not be entitled to build a dam for the irrigation of thirty-one *and then use it to put water all over the Luig land, in violation of the decree, and that is exactly what the use of the Luig dam did in 1915*, and if he did put in a new dam we would be entitled to have its use regulated by decree, so as not to interfere with our rights, but that is not what the appellant desires. He desires to get the benefit of the decree permitting this Luig dam to be used at certain

times, irrespective of our rights, and then also to use it at all other times, irrespective of our rights also.

Another point made by appellant in regard to this dam is that it was charged that he "encouraged, advised and *assisted*" Luig in putting in the boards in this dam, whereas the evidence showed that he put them in himself. Certainly the proof of the greater included proof of the lesser, and if he put in these boards in violation of the decree and put water all over the Luig land, as the testimony shows he did, he certainly assisted Luig in violating the terms of the decree, and this whether he assisted him with Luig's knowledge or without his knowledge. No such transparent evasion of a decree can be permitted (*State v. Lavery*, 31 Or. 77).

3. As to the matters on the east fork, counsel first say that they were "trivial." Considering that they involve the taking of all of the water of that fork of the river during the only period when the river even approached what would be called a flood, such a characterization would appear to be used more in a facetious than a serious sense. It may seem "trivial" to the appellant to deprive the complainant of all of the water of the river, and we suppose this is also in keeping with the aim of the appellant not to be "technical" (p. 206-7). To be "technical" would be to take just exactly what a man was entitled to, nothing more or nothing less. To be generous would be to give your neighbor a little more than he was entitled to, and we leave it to the appellant and to the court to invent the proper word to characterize the conduct of the appellant in taking all of the water of the river at a time when he was not entitled to take any of it.



4. As to the drain ditch, defendant complains because the court provided he might purge himself of contempt "by closing the drain ditch so as to prevent the same from diverting water from said river or from being used except to drain surface water from the lands described in the decree." This was intended to be, and would seem to be, in strict accord with the decree, which is that he might use the drain ditch only "for the purpose of draining water from the surface of the land above described." Personally, we were never able to see why it should be held that Hanley should be permitted to divert water from *the river* to drain surface water from the land, but if the original decree is subject to that interpretation, the contempt order is likewise. On the merits of the use of the drain ditch, appellant's argument is a series of contradictions. In the first place, he attempts to justify the diversion of water through the drain ditch, which admittedly continued up until the 8th of April, because there was ice in the river; whereas the testimony shows that the month of March was not at all a freezing month (Appellee's Printed Rec., pp. 59-60); and then he contends that he is entitled to use the drain ditch during a flood, but the record shows there was no flood that year (Appellant's Printed Rec., pp. 169-170); and then on the other hand he claims that he may use the drain ditch to drain the water out of the river, although it deprives the complainant even of stock water, which would mean that he might take it out at the lowest stages of the river (Brief, p. 82).

Counsel contend that we did not show that the water going through the drain ditch was being used by Hanley for irrigation. The photographs themselves show the

water seeping all over his land, but it is entirely unnecessary for us to assume the burden of proof of an entirely immaterial matter. Whether he takes this water for his own use or simply to spite the Pacific Live Stock Company is entirely immaterial to us. All we know is that the evidence shows that this water is taken away from a great body of our land to the destruction of our crops, and that is all that we need to show in this proposition. In this connection, the court should not be misled by the fact that the drain ditch leads down to one section of land that the company owns; that is an isolated section of land, far removed from the great body of land of the complainant where it desires and wants this water during that season of the year, but it should also be noted that it is stated in counsel's brief that the Pacific Live Stock Company has no interest in the drain ditch. This remark does not seem to have any relevancy to this case, and we simply refer to it for the purpose of avoiding any contention that we acquiesce in counsel's statement. Counsel's own brief shows that it was constructed partially for the irrigation of our section thirty-six, and whether we have any right to irrigate that section through that ditch is not involved in this matter.

Counsel's attempt to obviate the clear conclusion of the trial court that Hanley's claim that he had the drain ditch open for the purpose of draining water off his land was not made in good faith, in view of the fact that he himself was using every means to divert water onto the lands, is unavailing. The evidence shows without any dispute that through his ditches and by means of his dams and through the cuts in the bank of the river, he was diverting all of the water of the river, and photographs of his land are

the best evidence of that fact; and his further insincerity in claiming that if he did not divert it through the drain ditch it would overflow his land below in section thirty-five is made still more ludicrous when he was at the same time objecting to the Pacific Live Stock Company diverting water out through their ditch in the adjoining section thirty-four, which would have the same effect as his drain ditch.

5. As to the cuts in the bank of the river, counsel's plea again is deprived of all sincerity by the constant reiteration of the fact that he does not want these cuts open and has done everything to keep them closed. Why then should he come before this court on appeal as one aggrieved by a decree which directed him to do the exact thing which he says he desires to do, and to have done? The reason is obvious by reference to page 75 of his brief, where he says he wants to keep them closed, but "he wants to do it for his own purposes, as above explained," which means that he wishes to leave them open with some little sticks in at the head, where he can put in a bunch of stack bottom and keep the water out if he does not want it, or conveniently remove it if he does, instead of in good faith filling them up with plows and scrapers, as his own witnesses testified was the proper method to follow. We can not too earnestly call the attention of the court to this situation. This decree having specified the means of diversion which the various defendants may use, and having also given them the benefit of the natural overflow (which could scarcely be taken away anyhow by a lower owner), to now permit each defendant to either actively or passively allow openings or cuts to be made in the banks where the water might run out unrestrained,

particularly in view of the fact that the bank of the river is higher than the adjoining land, would be to make this decree a mockery and authorize them ultimately to take all of the water of the river.

6. There is one matter contained in counsel's brief that seems to us might very much better have been omitted. By reason of a very unfortunate answer filed by Hanley, claiming that none of these violations had been called to his attention, and particularly referred to certain conversations with Mr. Treadwell to support that contention, it was necessary for Mr. Treadwell to take the stand, which is always a disagreeable thing for counsel to be compelled to do, but the trial court heard the evidence of both Mr. Hanley and Mr. Treadwell in this matter, and it is sufficient to say that it appeared that Mr. Treadwell not only complained to Mr. Hanley about the conditions on the east fork, but also complained to his attorney, Judge Webster. Counsel then attempted to further cloud the issue by claiming that our hostility to Mr. Hanley grew out of a matter affecting our land title, and put in a couple of letters on that subject, which he has included in his record in this court. This matter was disposed of to the satisfaction of the trial court by the following testimony, which appellant has omitted from his record:

"The feeling of hostility to Mr. Hanley has been from the very first time that he violated this decree, which he violated, and has been held to have violated a few years after it was entered. Our hostility to him has been continued and consistent, from that time, and he has violated it, in our opinion, every year since that time. We have had numerous proceedings against him, without any results. So, as far



as the feeling is concerned, it is there irrespective of the suit [as to the land title]" (Appellee's Printed Rec., pp. 43-44).

His lack of sincerity in this matter was very apparent to the trial judge by the fact that when this contempt proceeding was commenced he had published in the "Oregon Journal" a nasty attack upon the complainant, complaining that it was trying to keep the land for range, whereas he himself has never sold an acre of his land to the people (Appellee's Printed Rec., pp. 44-6). It seems to us that there was little enough excuse for bothering the trial court with matters of this kind, and that there is no excuse for bothering this court with them.

We respectfully submit that the appeal should be dismissed or the order affirmed.

Respectfully submitted,

WIRT MINOR,

EDWARD F. TREADWELL,

*Solicitors for Appellee.*



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No. 2722.

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IN THE  
**United States Circuit  
Court of Appeals**

For the Ninth Circuit

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**WILLIAM HANLEY**

APPELLANT

VS.

**THE PACIFIC LIVE STOCK COMPANY**

a Corporation

APPELLEE

---

**APPELLANT'S REPLY BRIEF**

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF OREGON  
FROM THE DECREE ENTERED AUGUST 3, 1915

---

**C. E. S. WOOD  
LIONEL R. WEBSTER  
ERSKINE WOOD**

Attorneys for Defendant and Appellant

**Filed**

**MAR 20 1916**

**F. D. Monckton,**  
Clerk





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No. 2722.

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IN THE  
**United States Circuit  
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For the Ninth Circuit.

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WILLIAM HANLEY,

Appellant,

vs.

THE PACIFIC LIVE STOCK COM-  
PANY, a corporation,

Appellee.

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APPELLANT'S REPLY BRIEF.

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PART I.

ON MOTION TO DISMISS APPEAL.

In criminal contempts review by the appellate court is had by writ of error. In civil contempts it is had by appeal.

Gompers vs. Bucks Stove & Range Co., 31 Sup.  
Ct. Rep. 492.

Wilson vs. Calculagraph Co., 153 Fed. 961.

Clay vs. Waters, 187 Fed. 385, 392.

This rule is in fact conceded by the appellee, the

appellee's motion to dismiss being based on the contention that this present case was one of criminal, rather than civil, contempt.

In the Gompers case above cited, the Supreme Court of the United States, took especial pains to classify contempts into civil and criminal and to point out the earmarks by which each class might be recognized. Prefacing its remarks with the statement that contempts are not wholly civil nor altogether criminal, and that it may not always be easy to classify a case as civil or criminal because it may partake of the characteristics of both, the court said:

“It is not the fact of punishment, but rather its character and purpose, that forthwith serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefits of the complainant. But if it is criminal contempt, the sentence is punitive, to vindicate the authority of the court.”

The court then points out that either class may partake somewhat of the nature of the other, for, where a punishment is purely remedial, there is, as an incident thereto, a vindication of the court's authority, and on the other hand where the punishment is purely punitive to vindicate the authority of the law, yet the complainant nevertheless derives some incidental benefit therefrom because punishment tends to prevent a repetition of the forbidden acts.

It is not possible therefore to classify cases so that they shall be wholly remedial or wholly punitive. The essentials of the case must be looked at, and if they show a case of civil contempt, the case must be so classed, though there may be some elements of criminal contempt involved in it, and vice versa. It is the main characteristics of a case which must govern.

Applying to the present case this important test of whether the object sought was remedial or punitive, we find that every single word in the decree adjudging Hanley in contempt is there for the purpose of affording the complainant a remedy. There is not a punitive element in the decree. Paragraphs I to VII of the decree contain findings of fact; paragraphs VIII to XIV contain the things that are to be done by the defendants to purge themselves of contempt. First (paragraph VIII) Hotchkiss and Thornburg are to remove the Young Dam so that the water can flow down to complainant, and Hotchkiss is to pay one-eighth of complainant's costs. Second (paragraph IX) Carey Thornburg is to remove his dam and pay one-eighth of the costs. Third (paragraph X), the defendant Hanley is to remove the obstructions in his dam in Section 21 and keep that dam open as required by the decree, and is to close his drain ditch so that it shall not divert water from the river, and is to repair the breaks in the river bank, and is to pay the balance of complainant's costs, namely, six-eighths thereof, amounting to \$332.80, and is to pay, in addition thereto, the sum of \$250.00 *for the use of the complainant*, this latter sum, however, not



to be construed as *wholly compensatory for plaintiff's loss*. Fourth (paragraph XI), defendant Young is to forthwith remove his dam, but is permitted to rebuild his old dam further down the river, provided he builds it so that the water of the river shall not be obstructed thereby, except as permitted by the decree. Fifth (paragraph XII), defendant Thornburg is to remove from the channel of the river the old Voegtly Dam. Sixth (paragraph XIII), defendant Hanley is enjoined from using the Young Dam or the Luig Dam. Seventh (paragraph XIV), defendant Hanley is ordered to remove the remains of the old bridge across the East Fork of the river, which complainant claimed was obstructing the water.

Those are all the requirements of the decree. Everyone of them is for complainant's benefit and therefore purely remedial. Not one of them is punitive. There is no fine of any kind imposed for the benefit of the United States.

The foregoing, of itself, is sufficient to show that the objects of this proceeding were purely remedial and therefore this is a case of civil contempt, reviewable by appeal. But still following the tests laid down in the Gompers case, we find that the court said there, 31 Sup. Ct. Rep., page 499, second column:

“There is another important difference. Proceedings for civil contempt are between the original parties, and are instituted and tried

as a part of the main cause. But on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause."

And the court then proceeded to point out that the Gompers contempt proceedings "were instituted, entitled, tried, and, up to the moment of sentence, treated as a part of the original cause in equity"; that the Bucks Stove & Range Company was not merely the nominal but the actual party on the one side, with the defendants on the other; and that the Stove Company acted throughout as complainant in charge of the litigation, and its counsel, acting in its name, made stipulations only proper on the theory that it was proceeding in its own right in an equity case, and not as a representative of the United States, prosecuting a case of criminal contempt. The Supreme Court also pointed out that in the submission of the case before it, the Stove Company appeared as the sole party in opposition to the defendants, and that its counsel, in its name, had filed briefs and made arguments in that court favoring the affirmance of the judgment of the court below.

Now every one of these things that the Supreme Court pointed out as earmarking the Gompers case as one of civil contempt, can be found in this present case. The affidavit of John Gilcrest, which initiated this contempt proceeding, is entitled, in the original cause, and is even carried on the docket of the lower court under the same number as the original cause. (Record p. 14).

This present contempt proceeding was tried as a part of the original cause, and the opinion of the judges on previous contempt proceedings arising under this same decree, were read and the complainant's counsel itself used a map before the court which they secured from the files of the original cause, and the trial court, in determining what record should be presented to this appellate court, ordered that in addition to the printed record, the whole of the original record from the first inception of the main case in 1898, down to the present time, should be sent to this appellate court. The Pacific Live Stock Company acted throughout as complainant in charge of this litigation, as the actual, not the nominal, party, and its counsel, just as the counsel did in the Gompers case, made waivers and stipulations "only proper on the theory that it was proceeding in its own right in an equity case and not as a representative of the United States prosecuting a case of criminal contempt." (Record, pp. 260 and 313. See also signed stipulation p. 3). And the Pacific Live Stock Company is now before this court, just as the Stove Company was before the Supreme Court in the Gompers case, as the sole party in opposition to the defendant Hanley and has filed its brief and is making its argument to dismiss this appeal and affirm the judgment below.

Referring to the fact that this contempt proceeding was entitled in the main cause, we point out that the Supreme Court, commenting on a like state of the record in the Gompers case, said, p. 500 first column:

"This is not a mere matter of form, for

manifestly every citizen, however unlearned in the law, by inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution, whether it sought to benefit the complainant or vindicate the court's authority. He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charge against him, but to know that it is a charge, and not a suit."

Following this same line of thought, we say that Hanley was entitled to be apprised by the complainant whether this was a civil or a criminal contempt and that the complainant, having treated the whole proceeding up to the present time as a civil contempt, should not be allowed to so much as open its mouth to argue a motion to dismiss this appeal on the theory that the proceeding was criminal and should have been brought up by writ of error. If this were the only reason why this court should deny the appellee's motion, such reason would be sufficient.

Another earmark of a civil contempt case, as contradistinguished from a criminal contempt, is pointed out by the court in the Gompers case, and that is that in civil contempts, the complainant, if successful, is entitled to costs. (Gompers case, p. 500). But that in criminal contempts costs are not usually paid, and if paid, go to the government. The court pointed out that in the

Gompers case the complainant asked for and got its costs. So in this present Hanley case, the complainant asked for its costs (Mr. Minor's argument p. 460 of the original transcript of the testimony), and the court gave the complainant its costs. (See the decree.)

After showing that the parties in the Gompers case construed it throughout as a civil contempt proceeding, which was a part of the original equity case (just as the parties did in this case) the Supreme Court said, in the Gompers case, page 501:

“In case of doubt this might, of itself, justify a determination of the question in accordance with the mutual understanding of the parties, and the procedure adopted by them. But there is another and controlling fact, found in the brief, but sufficient, prayer with which the petition concludes.”

And the court then proceeded to point out that the prayer showed clearly that remedial relief and not punishment was sought, the concluding words of the prayer being: “That petitioner may have such other and further relief as the nature of its case may require.” This was taken to show that a remedy and not a punishment was the essential idea of the case and that therefore it was a civil contempt.

Now in the present case the prayer of the affidavit says only this:



“Wherefore, the said complainant asks that an order to show cause be issued, and that the said defendants be dealt with in such a manner as may be meet in the premises.”

But in the argument, in the lower court, Mr. Minor, counsel for the complainant, showed clearly that what the complainant was after was *remedial relief*, for he urged that the court should punish the defendants by compelling them, for that current year of 1915, to leave their dams open during the whole period that the original decree allowed them to keep the dams closed, so that the water which complainant said it had been deprived of in the earlier part of the season might come down to its lands in the later part. This was the only punishment suggested by the complainant. And here are Mr. Minor's very words (page 457 of the original typewritten transcript of testimony in this proceeding on file in this court) :

“I come now, if your Honor please, to suggest to your Honor what, in my judgment, should be done in this case. I do not believe these men should be mulcted heavily in damages. I do believe that they should be punished, and I believe this is a case where the punishment ought to go to reimburse the party injured. This court has power to impose a fine, or to punish in any way which it may think proper; and I suggest to your Honor that the rights which these people now have to put in

their boards and to use this water, should be taken from them, and given to the party who has been damaged by their taking his right, or its right. In other words, for this year, your Honor should make some order which would give the Pacific Live Stock Company whatever water it is possible to give them upon their lands at this late period. And the only way in the world to do that, so far as I can see, if your Honor please, is to cut out these dams, take them out absolutely, let the water do down there, and let the Pacific Live Stock Company use such water as it can get for that purpose, and make such crop as it is possible."

Here followed a colloquy between Mr. Minor and the court as to whether this was feasible; whether the water could get down to the complainant in time to do it any good, Mr. Minor saying that it could. Then Mr. Minor continued as follows (p. 460) :

"I submit to your Honor, in common justice, we ought to have what these people say we shall have. If we cannot get that, then your Honor should give us what is nearest to it. And what is nearest to it is the use of the water for the balance of this year, without any let or hindrance from these parties, so that we may have some crops as well as they. And so that justice should be done in this case. Of course, these parties should be required to pay the costs, but

the costs in the case are comparatively small. But I will say, so far as my client is concerned, I had a talk with Mr. Treadwell last evening before he left, that if your Honor should find these parties guilty of contempt, as we think your Honor must do under the evidence in this case—our client would be better satisfied to have the water the balance of this year than to have any punishment which your Honor can inflict upon these defendants, or any of them. And that, moreover, will teach these people the lesson that if they take what does not belong to them, they will have to give that which does belong to them. If they cannot restore what they have taken, then they can make it good by giving what they have of like kind.”

Surely if the prayer of the petition in the Gompers case, praying that the petitioner might have relief, was held to be sufficient of itself to show that the proceeding was civil in its nature, then this argument of Mr. Minor’s certainly shows the same thing in this present case. It is in effect as much a part of the prayer for relief as if it had been written at the end of the complaining affidavit.

On page 6 of the appellee’s brief counsel points out that Judge Wolverton, at the close of his opinion, in which he directed that a fine of \$250.00 be imposed upon Mr. Hanley, said:

“This sum I consider in no way compensatory for plaintiff’s loss but I impose it by way of warning against any further contempt of the kind.”

And counsel argues that since the trial court said he imposed it by way of warning, therefore it shows that the fine was punitive and not remedial. This is a slight straw to seize upon when considered in the light of all the other things in the case earmarking it as a civil case. But even this straw may be brushed away by showing first that the fine of \$250.00 was imposed *for the use of the plaintiff*. (Opinion p. 73 and decree p. 78). Not a cent of it went to the United States, which it would have to do to support any argument that this was a criminal case.

Furthermore, even if Judge Wolverton had fined Mr. Hanley any number of dollars, the fine to go to the United States, and even if he had imprisoned Mr. Hanley for a year, it would not have shown that this was a criminal case. It would simply have shown that Judge Wolverton, in a civil contempt case, had imposed a sentence for punitive purposes—a thing which he would have had no right or jurisdiction to do. That was the very point in the Gompers case. In that case the court sentenced the defendants to six months, nine months and one year’s imprisonment, respectively, and the Supreme Court of the United States said that did not stamp the proceedings as criminal; it simply showed that the court had tried to administer punitive punishment

in a civil case and that it was without any shadow of right or jurisdiction to do such a thing, the Supreme Court saying (page 501) :

“The result was as fundamentally erroneous as if in an action of ‘A vs. B, for assault and battery’, the judgment entered had been that the defendant be confined in prison for twelve months.”

Counsel, erroneously assuming that there is *some* punitive feature about this case, further says, on pages 5 and 6 of his brief, that where a case contains both punitive and remedial elements, the punitive features always dominate the case and fix its character for the purposes of review, and cites *In re Merchants’ Stock & Grain Co.*, 223 U. S. 639, 56 L. ed. 584; *Kreplik v. Couch Patents Co.*, 190 Fed. 565; *Continental Gin Co. v. Murray Co.*, 162 Fed. 873.

In the first of these cases, *In re Merchants’ Stock & Grain Company*, fines of \$1000, \$2000 and \$500 were imposed, three-fourths of which would go to the complainant as compensation and *one-fourth to the United States*, and the court properly held that in view of this punitive feature of a fine going to the United States, the case was properly reviewable on a writ of error, and directed the Circuit Court of Appeals, which had dismissed the case as being a civil one, to reinstate it and take jurisdiction of it.



In the second case above cited, *Kreplik vs. Couch Patents Company*, the only point was whether, in a case of criminal contempt, remedial relief could also be granted, and the court held that it could. It further appeared in that case that *at the special request of the defendant himself the case was treated as a criminal contempt*.

In the last case cited, *Continental Gin Company vs. Murray Co.*, the only defense was that a contempt case for violation of an injunction against infringement of a patent and imposing a punitive fine in favor of the United States, was properly reviewable by writ of error and that on such review matters of fact could not be considered.

It is worth noting that in most of the cases cited by the appellee, especially those in the Supreme Court of the United States, the effect of the ruling is to *retain* the jurisdiction and give the parties an opportunity to be heard upon the merits, rather than to dismiss the appeal or the writ of error as the case may be.

## PART II.

### ON THE MERITS.

The administration of justice is often (if not generally) hindered by an abundance of irrelevant detail in relation to the problems actually presented for solution. And this case is not free from such offending. Yielding first place to our energetic adversary we freely

accept our full share of responsibility in that regard. And then too, there are other facts which, while helpful in their proper relation, serve only to hinder, if allowed to intrude into illogical relations. Eliminating, as far as possible, the irrelevant and keeping each fact within the radius of its logical application, let us consider, each in its proper order, the several separate offenses charged against Mr. Hanley in this proceeding. And each of these offenses is separate. No one charge depends upon the other. And what is more important to be remembered is, that, the fact that several independent and unrelated charges are *made* at the same time does not establish any relation between them. The fact of the making of charges in that way does have a tendency to create an atmosphere antagonistic to the person against whom the charges are made. And that fact accounts for the making of unfounded charges. But each separate charge must stand by itself or must fall alone.

In order that the legal principles involved may stand out clearly and their application to the solution of the problem presented be unobscured, let us consider the case as though all that has occurred and which is made the basis of these several charges, had occurred the next day after the decree, which it is claimed has been violated, had been rendered. And there certainly cannot be any possible legal or logical objection to that. Lapse of time and change of condition cannot make that contempt now, which would not have been contempt then.

It must be borne in mind that Silvis River is not a

river of constant flow but is one of those fitful and uncertain streams made by the melting of mountain snow and depending therefore for its flow and flood time, upon the extent of the snow fall and the rapidity with which it melts. The river enters the west side of the Harney Valley from the north and flows southerly into Malheur Lake. After it enters the valley it divides into two forks known as the east and the west fork, and so flows into the lake. At the time the decree was rendered Mr. Hanley owned a large tract of land known as the "Bell A Ranch" through which ran the east fork of the river. Near the north end of this ranch he had a removable dam across the east fork of the river and connected with (and served by) this dam were two ditches, one leading to the east and the other to the west. A few miles below he had another ditch connected directly with the east fork (but no dam) leading east and known as the Drain Ditch, because it was for drainage purposes only. Mr. Altschul owned a tract of land on the west river not far from what is known as the Young Dam and designated as section twenty-nine. Farther down on the west fork Mr. Altschul also owned other land designated as sections five and thirty-one. Below the lands of Mr. Hanley and Mr. Altschul and on both forks of the river, the Pacific Live Stock Company owned large tracts of land aggregating many thousands of acres. There were many owners of land on the river above the Company's lands but none of these need be now considered.

In that situation the Company brought suit against Mr. Hanley and many others to enjoin them from using

water from the river. The sole basis of the Company's claim for relief was that it was a riparian owner on the stream below the defendants. Mr. Altschul was not a party to that suit nor are his lands mentioned or referred to in the proceedings. A decree was rendered fixing the various rights of the several parties involved and it is that decree which Mr. Hanley is here charged with having violated.

As said above, we are now to consider the case as through the things done which are charged as the several violations of the decree had been done the next day after the decree had been entered. In that situation and as to the Altschul lands Mr. Altschul must be substituted for Mr. Hanley as to the lands owned by him.

In paragraph 1 of the affidavit which is the basis of this proceeding beginning at page 17 Transcript of Record, it is charged that a Mr. Luig had a dam in the west fork of the river on Mr. Altschul's land (sec. 31) which served to irrigate Luig's land below, that he, Luig, used that dam to divert water from the river at times when, by the decree, he was prohibited from so doing and thereby committed contempt. It is then charged that Mr. Hanley "encouraged, advised and assisted said Henry Luig in the acts aforesaid and in the contempt and violation of the said decree as aforesaid." The evidence conclusively demonstrates and it stands as conceded, that Luig did not do any of the things charged against him and he was discharged. Now, since Luig was not guilty

of doing anything in violation of the decree it manifestly follows that no one could be convicted of the offense of assisting and encouraging him in the doing it. The thing charged as having been done was not done. Is that not the end of the matter?

This dam (call it the Luig dam or the 31-dam, it makes no difference here) was used, let us concede for argument, at times when Luig was forbidden by the decree to use it. But it was not used by Luig. In a spirit of fairness to Luig and in order to be open and frank with the court, Mr. Hanley says that he used the dam for the purpose of irrigating the Altschul land (sections 31 and 5). Recurring for a moment to the specific nature of the charge, upon which we are being tried, let it be supposed, for a moment, that this use of water on the Altschul land was a violation of a decree against Mr. Altschul; no such charge is here made against Mr. Hanley. All that is charged is, that Mr. Hanley assisted and encouraged a man in the doing of something which it is now admitted he did not do. It is fundamental that in such proceedings as this the charge must be definite, certain and specific as in any criminal charge and that the defendant cannot be held guilty of anything not so charged. As well might a man charged with encouraging advising and assisting another to steal a horse be convicted of himself stealing a cow. Even in a civil case the judgment must be within the pleadings. A judgment on open account could not be rendered in an action on a promissory note. It is therefore clear, upon the established and unquestioned principles of pleading and pro-



cedure both in civil as well as criminal cases, that the first charge as made cannot be sustained.

But suppose the facts as admitted had been properly made the definite basis of a specific charge of contempt! Here is a man who was not a party to the suit in which the decree was rendered, who owns land, which is not in any way involved in the proceedings and he takes water from the river for the irrigation of that land. It is wholly immaterial whether in fact and as against the Company he has a right so to take water or not. His right in that regard cannot be determined or considered here.

The second charge (Paragraph 2 of Affidavit, Record pp. 18 and 19) is in reference to what is known as the Young dam. It was declared in the decree that Mr. Young (who owned some land on the west fork) and two other parties might maintain a dam and ditches for the irrigation of certain described lands and their use of the dam was limited to certain prescribed times. The decree also provided that whatever water would naturally flow into these ditches, when the dam was open, might be used by those who had the right to maintain the dam. This dam was washed out and these parties built, in its stead, a new dam a short distance above. It is charged that these parties had no right to build a dam at any place except on the exact spot where the old one was, that they constructed the new dam so that when open it would divert more water than the old one and that they dug a new ditch connected with the dam whereby the flow of the water in their ditches, when the dam was

open, was increased. It is then charged that in all this, these parties acted under the advice and encouragement and with the assistance of Mr. Hanley. It is to be borne in mind that this dam (as, indeed all the others) consist of a wooden frame so placed in the stream as to sustain movable boards placed against it and held in place by the pressure of the water. This frame work rested upon a permanent board foundation set in the bottom of the stream. The dam is said to be "in" only when the movable boards are in place. In the charge as to the Luig dam the movable boards were in place but here the charge is predicated upon the contention that the permanent part of the dam was so constructed as that more water flowed into the ditches when the boards were out than was the case with the old dam and also that the new dam was not built on the exact site of the old one. There is no charge here that this dam had been used *as* a dam (that is, that the movable boards had been put in place) by any one. And there is no pretense that any water had been diverted by the permanent structure of this dam by Mr. Hanley, or into any ditch of his or onto any land owned or controlled by him or that he had the remotest interest in, or the least use of, any water which came from that dam.

But here, as in the Luig charge, the lands of Mr. Altschul (Sec. 29) are involved. And we are to consider the case as though all that is claimed as the basis of the charge had occurred the next day after the decree had been entered. In that aspect of the case

it stands as if Mr. Altschul were charged with contempt as the owner of the Young dam. Here then is a dam built after the decree had been entered and which is owned by Mr. Altschul who was not a party to the suit, to serve lands not mentioned in the proceedings. And there is no pretense that this dam is even located on the site of any dam that was mentioned in the decree. It goes without saying that in that situation Mr. Altschul could not be held for contempt. The question as to Mr. Altschul's right to use that dam for the irrigation of his land cannot be involved in this proceeding. He did not violate the decree, as charged or otherwise, and that is the end of the matter.

It is very clear that, as to these two charges, if Mr. Altschul had done all that Mr. Hanley is charged with having done he would not be guilty. How, then, is Mr. Hanley guilty? Mr. Hanley owns stock in each of two corporations which own the Altschul lands. It is not pretended that these corporations were organized or are used as a subterfuge for the violation of the decree. Both corporations are bona fide business organizations in which other parties own substantial interests. But suppose Mr. Hanley personally owned the Altschul lands, he would have the very same rights as to these lands that Mr. Altschul had. The original suit was instituted as against certain rights of irrigation claimed and exercised by people on the river above the complainant. The *rights* thus claimed was the thing in issue—the rights, as relating to certain lands. And

it was that which was adjudicated. As to Mr. Hanley (and most if not all the others as well) certain dams and ditches were specifically mentioned. The suit did not relate to the personality of any of those who were made defendants but only to the rights claimed by them. These rights, as adjudicated, are expressed in the decree as relating to the particular person who then, so to say, owned that right, but beyond that right, the personality of him who owned it, is in no wise involved. The decree grants to Mr. Hanley, as the owner of certain land, dam and ditches, the right to take and use water from the river and specifies the nature and extent of that use and then declares that he shall not take any more water than granted by the decree. But this right is a property right. It is appurtenant to the land and is not personal to Mr. Hanley. And the prohibitive provisions of the decree likewise relate only to the rights involved and not to the personality of the man, as such, who may be then the owner of these rights. Mr. Hanley, as the owner of these rights, which were specifically mentioned in the decree, is enjoined from taking water from the river, except as provided by the decree. But Mr. Hanley, as a man and independent of these property rights, is not affected by the decree, and there is nothing which prevents him from acquiring and exercising other rights or claims to water from the river the same as though his name had never been mentioned in the decree. And so, even if Mr. Hanley were himself the owner of the Altschul lands, he would have the very same rights as Mr. Altschul. After the decree had been entered, Mr. Hanley bought a tract of

land on the river below, known as the Fennimore land, as to which a right of irrigation is claimed. Mr. Fennimore had not been made a party to the suit, nor were these lands involved in the proceeding—the situation was exactly the same as that of the Altschul lands. In 1905 Mr. Hanley was charged with contempt for having used water upon the Fennimore land. Judge Bellinger, in affirming Mr. Hanley's right so to use the water, said (Record, pp. 324-325):

“On about the line between sections 2 and 3, in township 24 south, range 21 east, there was in the river channel an old check-gate known as the Fennimore check-gate, used to impede the flow of water so as to sub-irrigate the lands further up the river. This gate had become decayed and useless for the purpose intended. Hanley, since the decree in question was entered, having acquired the Fennimore land, put in a new check-gate a short distance above the old one.

“The Fennimore interest was not involved in the suit in which the decree was entered, and the rightfulness of this check-gate was not adjudicated. Hanley's act, therefore, in putting in this check-gate is not a matter for which he can be required to answer in this proceeding.”

What has been said in reference to the relation of the decree to the personality of those named as defend-



ants applies equally to the dams, *as structures*, which are mentioned in the decree. The decree, though it specifies a particular dam, mentions it only with reference to the rights relating to it as involved in the suit. The dam, as a physical structure—a thing of timbers and boards—bears the same relation to the prohibitive effect of the decree as does the physical structure, so to say, of a man named in the decree. All the time it is the *right* which is involved—a particular right to take water from the river—and not the physical structure employed as the means of taking the water or the personality of the man who takes it. It is our contention that the structure known as the 31-dam, or the Luig dam, was the special structure employed for irrigation of the Altschul lands in sections 5 and 31, that it was built to take the place of a similar structure built in 1887 for the same purpose and that these lands have rights of irrigation utilized by means of these structures which have been exercised ever since the original dam was built. But, so far as this case is concerned, suppose that were not true and suppose this dam had been built by Mr. Luig and that it is the same dam mentioned in the decree as it declares Luig's rights! In that case Luig has certain rights of irrigation which he is permitted to exercise by means of this dam, but neither Luig, as a man, nor the dam, as a structure, is affected, as to other rights not involved in the suit nor referred to in the decree. In that situation of affairs Mr. Altschul uses this structure, known as the 31-dam, or the Luig dam, for the irrigation of his land. This use of the dam is entirely independent of

Luig and of any rights which he has or claims or of any rights in any way involved in the suit or affected by the decree. Of course Altschul could not acquire any right from or through Luig and there is no claim that he could. To state the case most strongly against us, grant that Altschul had no real right as against Luig to use the dam and his use of it cannot be tortured into a violation of the decree.

The Young dam, as known in these proceedings, was not mentioned in the decree and therefore, so far as its use for the Altschul land is concerned, it is an independent structure.

It is freely conceded by appellee at page 58 of its brief that the water rights of the Altschul land is in no way involved in this proceeding. And that is a very important matter to be borne in mind in the determination of the case. It is within this record that the water rights of everybody on the river is now in process of determination in the State Courts. A water right, in its relation to other such rights, depends upon the nature, extent and method of its use. The Altschul rights to, or in, the 31 or Luig dam, is a matter of much importance as relating to other rights and, since the Altschul water rights are not here involved, his right to that dam cannot be considered and Hanley's rights are Altschul's rights.

The other charges against Mr. Hanley involve his personal relation to the decree, and little remains to be said in reply, in addition to what has been said in our

original brief. All that is said by appellee in reference to the charges upon which Mr. Hanley was exonerated by the Court below, are entirely outside the limits of discussion. It is only the charges which were sustained below that are here for consideration.

The other charges relate to the twenty-one dam, the condition of the banks on the east fork of the river, as it flows through Mr. Hanley's land and to the drain ditch.

As to the twenty-one dam, it is charged that one board was allowed to remain in the dam and that brush was permitted to accumulate against the framework of the dam. This matter is fully discussed in our original brief, but special attention may be called to the fact that the one board was but six inches wide, extended but one fourth the distance across the river and was next the bank out of the current and in slack water, and that the brush was only a few small limbs of willow brush. But the absolutely conclusive fact in favor of Mr. Hanley is that these obstructions did not increase the division of water. These obstructions were removed as soon as Mr. Hanley knew they were there, which was before the 24th of April and, Mr. Griffing, who measured the outflow of the water, says that forty second feet was flowing into the 21-ditch from the first of April to the third of May (Record p. 94). It therefore conclusively appears that just as much water was diverted after as before the board and brush were removed.

The fact that Mr. Hanley did not open the banks of the river or do anything to increase the overflow or out-

flow is conclusively established. It also clearly appears that he had endeavored to repair breaks in the bank so as to confine the water to the channel. There has always been a natural overflow of the banks during high water and there are several breaks or openings in the banks. These have always been there and it has been Mr. Hanley's effort to keep them closed, both because it better serves for his own irrigation and also, as he says, in order to avoid, if possible, any cause or objection by the complainant. But Mr. Hanley is not under any legal obligation, either to close or to keep closed any natural opening in the bank of the river. The water shall flow as it was wont to flow and these openings in the bank afford as natural an outflow as the channel itself affords a natural onflow.

The only thing in addition to what is said in the original brief in reference to the drain ditch, that seems to call for attention, is the suggestion that the water in that ditch is of not the slightest use to Mr. Hanley. All the water that goes into that ditch is delivered directly on to the land of the complainant, and thence flows on down to its other lands below. Mr. Hanley has a right to use that ditch to drain water from his land whenever such drainage is necessary. The land from which the water is drained is hay land. The hay is put up and then the stock is brought onto the land for feeding. It was necessary to drain this land so that the stock could be fed there. And in the practical conduct of the business it is just as necessary to feed the stock there as it is to raise the hay.

A great deal is said by appellee about the diversion for the Fennimore land, about the Orphan Head Gate and ditch and about the Peoples Ditch, and the general complaint is made that the complainant has been short of water. But none of these things are relevant to the question really presented on this appeal.

Here are certain direct acts charged against Mr. Hanley as being in violation of a decree of the court. Each of these is regarded as a separate charge. And each must stand alone as though it were the only one that has been made. No one charge as such can lean upon another for support. It is respectfully submitted that not a single charge involved in this appeal has been sustained.

In conclusion, we call your Honor's attention to the fact that in that portion of the record which the appellee had printed are some matters which are not touched on in the record which appellant had printed, because appellant deemed them immaterial. If your Honors should deem any of them material it will not be fair to judge of them from the printed record alone— for appellant's printed record omits them, and appellee's printed record presents only one side of them. The reverse side of them can only be seen by reading the complete type-written transcript of the testimony, which, pursuant to Judge Wolverton's order, was sent down for your Honors' inspection. We think all material matters are in appellant's printed record. If your Honors think otherwise, and conclude some of the matters in appellee's rec-



ord are material, then we respectfully ask that you read the typewritten transcript to get the other side of them.

C. E. S. WOOD,  
LIONEL R. WEBSTER,  
ERSKINE WOOD,

Attorneys for Defendant and Appellant, William Han-  
ley.



No. 2722

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM HANLEY,

*Appellant,*

vs.

PACIFIC LIVE STOCK COMPANY

(a corporation),

*Appellee.*

## APPELLEE'S PETITION FOR A REHEARING.

WIRT MINOR,

Spalding Building, Portland, Ore.,

EDWARD F. TREADWELL,

Merchants Exchange Building, San Francisco,

*Solicitors for Appellee*

*and Petitioner.*

*Filed this.....day of July, 1916.*

*FRANK D. MONCKTON, Clerk.*

*By.....Deputy Clerk.*



No. 2722

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM HANLEY,

VS.

PACIFIC LIVE STOCK COMPANY  
(a corporation),

*Appellant,*

*Appellee.*

## APPELLEE'S PETITION FOR A REHEARING.

*To the Honorable William B. Gilbert, Presiding Judge,  
and the Associate Judges of the United States  
Circuit Court of Appeals for the Ninth Circuit:*

The Pacific Live Stock Company (a corporation), appellee, in the above entitled matter, respectfully petitions for a rehearing in the above entitled cause, and in support thereof submits the following for the consideration of the court.

### I.

THE LUIG DAM WAS USED FOR THE IRRIGATION OF THE  
LUIG LAND IN VIOLATION OF THE DECREE.

The simple, unvarnished facts in regard to this matter are: That by the final decree Luigi was per-



mitted to use this dam for the irrigation of his land during certain times of the year, and was enjoined from using it at any other time. Notwithstanding that, in the year 1915, all of the boards were placed in the dam, and by means thereof practically all of the water of the river was diverted *onto the Luig land*. There can be no doubt that if Luig had done this it would have been a clear violation of the decree and a contempt of court. It is also clear that if Hanley, or any one else, had assisted Luig in thus diverting the water onto his land in violation of the decree he would likewise be guilty of contempt of court for so doing, but it appeared that although the water was almost lapping the doorstep of Luig's house, he was conveniently away at his summer house during this period, so that if he did have anything to do with it it could not be proved, and instead of Hanley merely assisting him in doing this, it appeared, without dispute, that Hanley had done it entirely himself. Now, we respectfully ask the court how it can be less a contempt of court for Hanley to use this dam for the irrigation of Luig's land in direct violation of the terms of the decree, where he does it entirely alone, than it would be if he did it with the assistance of Luig. In other words, the use of that dam for the irrigation of the Luig land was forbidden during this period. Hanley was a party to the suit, and was aware of the decree. Notwithstanding those facts, he deliberately turns all of the water of the west fork of the river onto the very Luig land which is forbidden to use it during that period,

is held by the Circuit Court to be guilty of contempt of court for so doing, and still this court holds that such an act does not constitute a contempt of court. If such a proposition is maintainable, then all Luig has to do in any year is to go away to the country in the summer-time, and any obliging neighbor, whether it be Hanley or anyone else, may turn all of the water of the west fork of the river onto that land and be absolutely beyond the reach of the court. If this can be done in 1915, it can be done in any other year. If it can be done in April, it can be done in March or May, or any other time during which the decree prohibits it from being done. In other words, there is nothing in any case that could be proved any stronger than what was proved in this case. It was proved that the Circuit Court had forbidden the use of that dam to divert water of the west fork of Silvies river onto the Luig land during that time of the year. It was proved that the dam was used for the purpose of diverting practically all of the water of the river during that period onto that land. It was proved that this was done by Hanley, who was not only a party to, but had knowledge of that decree, and still this court reverses a decree of the trial court holding him guilty of violating the decree in doing what he was shown to have done. These, we respectfully submit, are the only relevant or material facts in this matter, and that they do constitute a contempt of court and a violation of the decree we respectfully submit is too clear for serious argument.

## II.

**JUSTIFICATION RELIED ON FOR THIS VIOLATION.**

Let us, however, briefly examine the justification for this violation of the decree. Hanley says that he owned certain land formerly belonging to one Altschul, which has water rights, and that also in connection with that land he has an interest in the Luig dam. Let us suppose for the sake of the argument that this is so. What justification was that for turning all of the water of the west fork of Silvies river *onto the Luig land*? Certainly none whatever. We do not claim that any water right which Altschul might have been entitled to as the owner of that land has in any way been affected by this decree, but there is not a suggestion anywhere in the case that Altschul ever had any interest in the Luig dam or ever was nearer to it than his office on Sansome Street in San Francisco. There is no suggestion in the record that Altschul ever diverted a drop of water from Silvies river, but Hanley says that he (Hanley) has an interest in the Luig dam, and had it prior to the commencement of the suit in which the decree involved herein was entered; but his own evidence showed that it was entirely a different dam that he attempted to claim an interest in at that time. Luig testified that he (Hanley) had no interest in the Luig dam until it was rebuilt about 1904, long after the decree in this case, and Luig, Gilcrest and Newman all testified that Hanley had never used the dam since the decree, and that it never had been used except in strict accordance with the decree, and the trial court held that Hanley had no interest whatever in the dam at the time of the former suit. Still this court

undertakes to disregard all of this testimony and to apparently hold that Hanley did have an interest in the dam at the time the suit was commenced, and this notwithstanding the well-established rule that in contempt proceedings the findings of the lower court will not be disturbed where there is a conflict of evidence.

*Besette v. W. B. Conkey Co.*, 194 U. S. 234;  
24 Sup. Ct. 665; 48 L. ed. 997.

But we respectfully submit that whether Hanley did or did not have any interest in the Luig dam at the time of the decree, in connection with his land in section 31, is a matter in no way involved in this proceeding. Hanley was shown to have put the boards in this dam and in violation of the decree diverted the water onto the land of Luig, and whether he did or did not have any right to use this dam for the irrigation of section 31 is entirely immaterial, because that would be no justification for using the dam in violation of the decree to irrigate the land of Luig which was forbidden to use it during that period, and consequently even if he did have any rights by reason of his lease or ownership of section 31 this would be no justification whatever for the violation of the decree actually committed. Whether or not he had any right to the waters of the river by virtue of his ownership of section 31 is a matter not necessary to a decision in this case.

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### III.

#### EFFECT OF FORMER DECREE AS RES ADJUDICATA.

One of the strongest reasons for the conclusion that Hanley had no interest in the Luig dam at the time of

the commencement of the former suit is that he did not set it up in that suit, but this court not only disregards that consideration, but also holds that his failure to set it up did not bar him, and this is based on a radical misstatement of the record in the previous case to the effect that the complaint in the previous case only attacked the diversions made by Hanley on the east fork of the river. What are the facts? The complaint in that action alleged that the plaintiff's lands were situated along the main channel of the east and west forks of Silvies river, and that the water thereof when unobstructed flowed through those lands and was used for its irrigation (Printed complaint, p. 1061); alleged that it was entitled to have the waters of Silvies river flow down its main channel and through the forks, branches, minor channels, sloughs and swales thereof down to its lands as it would flow if not obstructed or diverted (Printed complaint, p. 1113); alleged

“But notwithstanding your orator's said rights the defendants have wrongfully entered upon the channels of said river *and the channels of its said forks* above said lands of your orator, or some of them, and have wrongfully constructed and are now wrongfully maintaining divers dams in said channels and ditches leading therefrom; that is to say, The Harney Valley Dam, Ditch and Irrigating Company has one dam and two ditches leading therefrom; George Whiting, Thomas Whiting, Ione Whiting and John C. Foley, acting together, have one dam; N. Brown has one dam and one ditch leading therefrom; J. H. Byerly and C. P. Rutherford acting together have one dam; C. P. Rutherford has one dam and one ditch leading therefrom; C. A. Sweek has one dam and one ditch leading therefrom; M. Cushing, D. M. McMenamy and John I. Newman acting together have one dam and two



ditches leading therefrom; William D. Hanley has one dam and three ditches leading therefrom; W. H. Marrs and Manna Marrs acting together have one dam and one ditch leading therefrom; Joseph T. Barnes has one dam and one ditch leading therefrom; William Clark has one dam; F. L. Mace has one dam and one ditch leading therefrom; H. C. Levens has one dam and two ditches leading therefrom; George W. Young, Mrs. A. E. Young, Hull Hotchkiss and C. T. Voegtly acting together have one dam and one ditch leading therefrom; Green Hudspeth, James Dalton and Hull Hotchkiss acting together have one dam and one ditch leading therefrom; Casper Luig has one dam; Mrs. F. E. McGee has one dam; and Peter Clemens and B. R. Porter acting together have one dam and one ditch leading therefrom" (Printed Complaint, pp. 1113-14).

It will be seen from the above that the defendants were charged generally with diverting water from both the east and west forks of the river, and there was no statement whatever made that the diversions which were made by W. D. Hanley were made from the east or the west fork, nor was there any statement that the dam and ditches which were referred to were situated upon the east fork. The court, therefore, is in fundamental error in accepting the statement of the appellant that the complaint only charged him with respect to the east fork of the river.

The prayer for a discovery was as follows:

"your orator asks that they may each be compelled to make answer to this, its bill of complaint, and to make a full disclosure and discovery in regard to the rights or pretended rights, if any they have, for diverting the waters from your orator's said lands and obstructing its flow therein, as is hereinabove charged, and that they may each, according to the best and utmost of their knowledge, remem-

brance, information and belief, make full, true, direct and perfect answer to the matters hereinabove stated and charged.”

The matters stated and charged in the bill were that the defendants had wrongfully “entered upon the channels of said river and the channels of its said forks”. The prayer for an injunction was as follows:

“That your honors may be pleased to enter a decree in this cause perpetually enjoining and restraining the said defendants and each of them, their attorneys, agents, servants and employees, from diverting any of the water of Silvies river *or the east or west fork thereof* from their channels or impeding the flow of any of said water down to and upon your orator’s said lands as said water has heretofore been wont to flow therein when not interfered with by the defendants, and that said defendants and each of them may be required to remove their said dams from the channels of Silvies river *and said forks thereof* and may be perpetually enjoined and restrained from rebuilding the same *or in any manner obstructing the flow of said water*” (Printed Complaint, pp. 1116-17).

It will be seen from this that an injunction was asked generally against the defendants from diverting any water from Silvies river or the east fork or the west fork thereof, and no one could read the complaint without knowing that his right to divert any water from the main channel of Silvies river or from the east fork thereof or the west fork thereof was questioned and was about to be enjoined. The defendant, W. D. Hanley, subject to certain rights which were awarded him, stipulated that

“the complainant shall have a decree in this suit according to the prayer of its complaint” (Printed decree, p. 1144),

and subject to those rights the final decree contained the following provision:

“That the defendants W. D. Hanley \* \* \* and each and all of them and the attorneys, agents, servants and employees of them, and the attorneys, agents, servants and employees of each of them, be and they and each of them are perpetually enjoined and restrained and strictly inhibited from diverting any of the water of Silvies river *and any of the water from the east fork of Silvies river and any of the water from the west fork of Silvies river* from the channels of said rivers and from the channels of each of said rivers, and that they be and they and each of them are perpetually enjoined and restrained and strictly inhibited from impeding the flow of any of said water to and upon the lands of the complainant hereinbefore described as the said water has heretofore been wont to flow thereon when not interfered with by the said defendants and by the said intervenor, either jointly or severally, and that they be and they are and that each of them be and he is required to remove all and any dams which they or either of them may have, or which any one of them may have, in the channels of Silvies river *or in the channels of the east fork of Silvies river or in the channels of the west fork of Silvies river*, and that they be and they are and that each of them be and each of them is hereby perpetually enjoined and restrained and strictly inhibited from rebuilding the same, or any thereof; and that they be and they are and that each of them be and each of them hereby is perpetually enjoined and restrained and strictly inhibited from *in any manner* obstructing the flow of the waters of Silvies river and from *in any manner* obstructing the flow of the waters of the *east fork* thereof and from *in any manner* obstructing the

flow of the waters in the *west fork* thereof, and from obstructing the flow of the waters of said rivers, or any thereof, in all and in each of the channels thereof, save and except as is in this decree more particularly set forth'' (Printed decree, pp. 1180-1181).

It therefore appears that the plaintiff's lands were traversed by the east fork and the west fork of Silvies river and through the same received the waters of the main channel of Silvies river, the waters of the west fork and the waters of the east fork. It alleged that it was entitled to have said waters flow unobstructed to its lands. It charged the defendants generally with obstructing such waters; it prayed specifically that each of them be enjoined from obstructing the waters of the main channel or of the east fork or of the west fork; it was decreed that the defendants be enjoined from obstructing the waters of the east fork or the west fork except in the manner expressly permitted by the decree, and it was expressly provided that the waters of Silvies river and the waters of the west fork and the waters of the east fork, and the waters in any of the channels of Silvies river, could be used by the defendant only as in the decree set forth.

The propriety of a decree covering the whole river and all of its forks can not be questioned. The intention to cover the main river and both of its forks is so clear as not to admit of doubt. The decree by the clearest language did cover both forks of the river as well as the main river as to all the defendants, and still the decree is held not to apply to the west fork of Silvies river, all on the mistaken assumption that the complaint

did not involve the right of all of the defendants on both forks. This conclusion is attempted to be supported by the fact that after the general allegations that the defendants were obstructing the waters of the main river and of the east and west forks, the complaint specified the number of dams and ditches which were owned by various defendants; but there is nothing in the complaint that alleges on which forks those dams and ditches were situated, and it would be a strange proposition if a defendant could default to such a complaint and could then say that the judgment was only an adjudication as to the dam which he did have, but was not an adjudication as to a dam which he did not have, and that he could, therefore, immediately build another dam and it would not be covered by the complaint. How can the court say that the complaint referred to a dam on the east fork rather than to a dam on the west fork? But suppose the plaintiffs had only known of one dam owned by Hanley and had clearly designated and described it as being at some particular place or on some particular fork, would the court mean to hold that a decree that he be enjoined from obstructing the water by any dam or by any ditch at any place would be of no effect except as to the particular dam or the particular ditch that was specified in the complaint? Certainly not. The complaint sought to have the defendants enjoined from interfering with the water in any manner, or at any place, or by any dam, or any ditch. The plaintiff was undoubtedly entitled to that relief, unless the defendants appeared and justified by alleging themselves not only the ownership of some



dam or ditch, but by alleging and establishing a right to maintain it. We are now taking the position that W. D. Hanley did as a matter of fact own only one dam at the time of the decree, and it is true that we are taking the position now that the only dam he owned was in the east fork, but the court says we can not take that position because, forsooth, in the former suit we did not allege the fact that he owned a dam in the west fork. We claim he did not own a dam in the west fork. We claim that the evidence in this case shows he did not own any dam in the west fork, and how can our prayer that he be enjoined from diverting the water of the east fork or the west fork or the main channel be limited because we did not allege that he owned something which we even now claim he did not own, and certainly never knew of his claiming to own prior to the present contempt proceeding? The purpose of that suit was to compel each of the defendants to set forth any right which they had in and to the waters of the east fork or the west fork or the main channel of the river, but, as the court now construes it, any defendant can put as many dams in the channels of Silvies river, or any of the forks thereof, and maintain them as they see fit, provided they are not the particular dams specifically referred to in the complaint. Such a result is simply to make an absurdity of the decree. It is obvious that the plaintiff in drawing the bill thought it knew the dams and ditches which the various defendants owned, and while it specified them so far as it did know them it asked a decree enjoining any diversion or any obstruction of the water of the river, but according

to the present decision this specification of certain obstructions destroyed the whole effect of the decree, which the court rendered and it results that no defendant is enjoined in any manner except in respect to the particular dams and ditches so specifically referred to. Such a construction makes the entire decree nugatory and of no force and effect whatever.

We respectfully submit that the entire decision on this subject is based on an erroneous acceptance of the statement of appellant that the east fork was not involved in the complaint and decree, but it is not only its effect upon this particular case that demands a further hearing in order to correct that error, but it is the effect that it will have upon the entire decree, for certainly each of the defendants is in exactly the same position as William D. Hanley; the dams of each were specified and to hold that the decree is nugatory as to him except as to the particular dam specified in the complaint would apply equally to each of the other defendants, and it would therefore result that the decree was of no force or effect whatever to prevent the defendants from obstructing the water in any way they saw fit, except by the dams so specifically mentioned. Such a conclusion is utterly unsupported by reason or authority. The complaint asked that the defendants be enjoined from diverting water from the main channel or from the east fork or from the west fork. The defendants consented to a decree enjoining them from diverting water from the west fork or diverting water from the east fork or from diverting water from the main channel. The jurisdiction of the court to enter

such a decree is undoubted because the parties appeared and consented to it, and even if by any possible construction the complaint could be held not to authorize such a decree, which we dispute, the court had full power to construe the complaint, and did construe it, and did enter such a decree upon the stipulation of the parties, and having full authority and jurisdiction to do so the decree can not be questioned at this date. We have said nothing of the injustice of permitting it to be questioned, but here it appears by the testimony in this case that for sixteen years since the entry of that decree it has been scrupulously carried out with respect to the Luig dam, which has been operated by Luig in strict accordance with the decree. In the meantime Caspar Luig has died, as appears by the record, and since the trial in this contempt matter his brother has likewise died, and the court can well believe, which is a fact, that other important witnesses have likewise died since that decree was entered. The purpose of that suit was to have the rights of the parties fixed and determined, and if Hanley did have an interest in the Luig dam at that time, and the decree was not binding upon him in respect thereto, the decree was an absurdity since Luig's use of the dam was limited only by the time it might be operated, and if Hanley could operate it all the rest of the time, it is obvious that the purpose sought by the stipulations, which became a part of the decree, never could be carried out. We say, therefore, that the trial judge was fully justified in holding that the claim of any right of Hanley in that dam prior to the decree is without foundation, and we moreover submit that that

decree necessarily enjoined him from using that dam, or any other dam, on the east or west forks of the river, except the dam which he was expressly permitted to use.

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#### IV.

##### **NO CLAIM OF ANY RIGHT ACQUIRED FROM ALTSCHUL.**

The court makes some point of the fact that Altschul, the owner of certain land now owned by Hanley, was not made a party to the suit. It is sufficient to say that we do not claim that any right which Altschul had there as a riparian owner, or as an appropriator, has been in any way affected by the suit. If he had any right before the suit he had it afterwards, and if it has since passed to Hanley, he likewise owns it irrespective of this decree, but there is no claim that Altschul ever had any interest whatever in the Luig dam, or ever conveyed it to Hanley. Hanley's claim is that he (Hanley) owned an interest in it prior to that suit, and at the time it was instituted. We, furthermore, respectfully submit that none of these matters as to the water rights of Altschul or the water rights if any acquired by Hanley from him are in any way involved in this proceeding. What is involved in this proceeding is a use of the Luig dam for the irrigation of the Luig land in clear violation of this decree by a person who was a party to the decree and had knowledge of it.

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#### V.

##### **THE WHOLE RIVER WAS INVOLVED IN THE FORMER CASE.**

The court make some point of the contention that the entire stream was not involved in the prior case.

This has been pretty well disposed of in the analysis of the complaint and decree, which has already been made. The complaint alleged that the plaintiff was entitled to the natural flow of the stream to its lands, unobstructed, both of the main channel, the east fork and the west fork, and sought to enjoin the defendants from interfering with such flow. It is, therefore, clear that as against the defendants the complainant did claim the full flow of the entire stream and as against them by the decree the court did enjoin them from interfering with the flow of any part of the stream to the complainant's land. We are at a loss to see how a case could more fully and clearly involve the entire stream so far as the parties thereto were concerned. In fact the last paragraph of the decree shows clearly that the decree was intended as an adjudication as to the waters of Silvies river and the waters of the west fork and the waters of the east fork thereof. That paragraph is as follows:

“20. That this decree shall run in favor of the complainant, its successors and assigns, and against the defendants, their heirs, personal representatives, successors and assigns, and against each of the said defendants and the heirs, personal representatives, successors and assigns of each of said defendants; and against the complainant, its successors and assigns in favor of the said defendants, their heirs, personal representatives, successors and assigns; and that the water of Silvies River *and the waters of the west fork of Silvies River and the waters of the east fork of Silvies River* and the waters in any of the channels of said Silvies River and in any of the channels of the east fork thereof and in any of the channels of the west fork thereof may be used and enjoyed by the defendants only



as in this decree is particularly set forth, *and not otherwise*, and only at the times and in the places and for the purposes in this decree set forth, *and not otherwise.*”

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## VI.

### USE BY HANLEY OF THE YOUNG DAM.

The decision of the court on this matter is even more startling than its decision of the matter of the Luig dam. The facts in regard to the Young dam are: that it was constructed by Young in the very teeth of the decree; the court in a previous contempt proceeding so held, and that it was so constructed is not open to dispute; notwithstanding this, in 1914 it was again used by Hotchkiss and Thornberg to irrigate their land, in clear violation of the decree. The court so held and directed these parties to remove the dam. They have not appealed and the court must assume that that direction has been carried out, as it in fact has been. Still, the court on the appeal of Hanley, holds that Hanley had a perfect right to use this dam. Let us see, therefore, how Hanley acquired any interest in it. His first version was, in his sworn answer, that he acquired it after it was constructed by Young and before he knew that it had been constructed in violation of the decree of the court. Of course from a legal standpoint this could not be so, because Hanley himself being a party to the decree and knowing all about it would at least have constructive notice that the dam was illegally constructed, but he afterwards entirely abandoned this contention and testified that after Young had been held to

have violated the decree in constructing it he purchased it from Young. The case, therefore, simply comes to this: that after a structure is built in violation of the terms of a decree and in contempt of court, the party constructing it may entirely avoid the consequences by turning it over to another party to the suit, who has full knowledge of the fact that it was illegally constructed. Certainly to assist one to maintain a dam illegally constructed is as much a contempt of court as to assist him to construct it, and if it was illegally constructed in contempt of court, the court certainly had power and authority to order it destroyed, and that was what was done in this case, and the court practically now holds that this was entirely wrong, and that Hanley could prevent its destruction by purchasing an interest in it with full knowledge that it had been declared by the court to be illegally constructed.

In the first place, there was no necessity for this court to pass on any such a matter. Hanley denied that he had used this dam and by means of that denial escaped a conviction for contempt on that particular count. Hotchkiss and Thornberg had used it and had used it in clear violation of the terms of the decree, and were, therefore, properly held guilty of contempt, and to say that the power of the court to carry out a decree by requiring the removal of a structure constructed in violation of the decree of the court can be circumvented by transferring the same to another party in the case, is, to our minds, so clearly unsustainable that we are satisfied it would not receive the conscious approval of this court.

Another version of this matter was that Hanley had assisted Young in the original construction of this dam. On this theory it therefore appears that Hanley assisted Young to construct this dam for the use of his (Young's) land, in admitted violation of the decree, and the court therefore certainly had authority to require Young to remove it, and Hanley, having assisted him to build it, in violation of the decree of which he had knowledge, can not complain of the order of the court requiring Young to remove it.

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## VII.

### THE DRAIN DITCH.

The fundamental error which the court has committed in regard to this matter is in confusing the drainage of water from the surface of Hanley's land, however it may come upon it, with the diversion of water from the river into the Drain ditch. This matter is of such immense importance and any decision on it so far-reaching that we trust the court will not hastily affirm the decision which has been arrived at in respect thereto. The evidence in this case shows that in the year 1914, during the month of April, thirty feet of water was diverted through the Drain ditch. While the record does not show the full capacity of the ditch, it does show from the position of the boards in its head that this was nothing like the capacity of the ditch, and so far as the legal principle is concerned, it would be the same if the ditch had been wide opened, taking all of the water of the river, and if a contempt proceeding for taking

thirty feet of water could not be maintained neither could a contempt proceeding for taking all of the water of the river be maintained. It has certainly been decided, at all events, that Hanley can not use the Drain ditch for the purpose of diverting water out of the river when it is unnecessary to do so in order to drain water from the Hanley lands (*Pacific Live Stock Co. v. Hanley*, 200 Fed. 468, 484). The court, in its opinion, says that the trial court did not find that this was the condition of affairs in 1915, but in this the court is in error, for the trial court did hold

“That during the months of March and April, 1915, and at times when it was unnecessary to drain water from the lands of William Hanley, the said defendant, William Hanley, in violation of the terms of the said decree permitted the head of the Hanley Drain Ditch to be opened” etc. (Trans. p. 76).

Not only did the court so find, but the evidence showed, that during the very time that Hanley had the head of the Drain ditch open so that it would divert from the river at least thirty feet of water, he was himself diverting all of the water of the river, and of both forks, onto his land, for the purpose of irrigation. It therefore results that during the time when the Hanley land was being irrigated and all of the water of the river was being diverted for its irrigation, and that therefore it obviously needed irrigation and not drainage, Hanley was diverting thirty feet of water from the river into the Drain ditch. Now, if that was not a violation of the decree in this case, it necessarily follows that no diversion through the Drain ditch of water of the river at any time could be a violation of that decree, and it

therefore follows that Hanley with impunity can divert any quantity of water from the river into the Drain ditch during the irrigating season without violating this decree. This simply amounts to making the dissenting opinion of Judge Gilbert, reported in 200 Fed., p. 485, the prevailing decision of the court in this case.

In the answer of the defendant Hanley, in the original case, he refers to the Drain ditch as follows:

“The same was built to be used and is used by this defendant solely for the purpose of draining water from certain of his land as above described and was not intended to be used, and never has been used by him for the purpose of irrigation; that there is no dam in connection with said ditch and that by draining the water off from his land through said ditch he prevents a large tract thereof from being so submerged with water as to render it valueless, and that thereby he is enabled to and does reclaim a large body of his land so that the same can and does produce abundant and valuable crops of wild grass every year, which is used for hay and pasturage by this defendant” (Trans. p. 10).

It will be seen that by this answer the defendant in no way alleged any appropriation of water by means of the Drain ditch, nor did he in any way claim a right to divert water from the river by means of it and of course the court well knows that he could not in law divert water from the river for the purpose of drainage. It is clear, therefore, that on such an answer he would not have been entitled to have justified any diversion of water from the stream. He therefore entered into a stipulation that the Drain ditch should be maintained “for the purpose of draining water from the *surface* of the land above described, and not for the



purpose of irrigation''. It was certainly held in the former case in this court that he could not by means of the Drain ditch divert water from the river into the head of the Drain ditch

“when its waters are not so high as to make it necessary or proper by means of the Drain ditch to drain surface waters from the lands specifically described in the eleventh subdivision of the original decree”.

Certainly it can not be contended by any one that it is necessary or proper to drain water from the surface of the land when the owner of the land is by every means in his power endeavoring to divert water upon those lands for their irrigation. The court seems to entirely confuse the use of the Drain ditch for the drainage of water from the surface of the land into the same with the use of the Drain ditch for diverting water from the river. For instance, the court refers to the fact that the defendant had a right to use the Drain ditch for the purpose of draining from his land the water which legally went out either through the Upper Hanley ditch or otherwise. No one has ever disputed that proposition, nor has any one ever disputed his right to use that water in any way he sees fit on the land described in the decree, but the diversion of water from the river into the Drain ditch is quite a different proposition, and the effect of the present decision is that Hanley without let or hindrance can divert any quantity of water he sees fit, even to the whole river, through the Drain ditch, even during the period when he is himself diverting water from the river in the ditches which he is allowed to use for the purpose of

irrigating the land. The court makes a point that it was not specifically shown that this water so diverted was used for irrigation. What difference can that make to complainant? The water was diverted out of the river channel where the complainant was entitled to have it flow, and away from the lands to which complainant was entitled to and desired to have it flow. Whether it was used for irrigation or wasted or allowed to come back to the river some sixteen miles below, and far below places where the complainant would have diverted and used it, is an entirely immaterial proposition. At all events, the majority of this court in *Pacific Live Stock Co. v. Hanley*, 200 Fed. 468, 484, did hold that Hanley was in contempt of court for diverting water when it was not proper or necessary to do so for the purpose of draining water from the surface of the land, and the trial court in this proceeding held that he did, in 1914, divert water into the Drain ditch when it was unnecessary to drain water from the Hanley lands (Trans. p. 76). Still this court reverses that order which is in exact accord with the holding of this court on the former appeal.

Not only that, but on the trial of this case Hanley did not claim that during this period it was either necessary or proper for him to divert water through the Drain ditch and took the position in his sworn affidavit that he had not diverted any water through it at all during that period. We showed by evidence that was uncontroverted that he had diverted water during that period, and now this court undertakes to uphold his right to divert water through the Drain ditch at a

time when the trial court found on sufficient evidence that it was entirely improper, and during a time that he himself did not claim it was proper to divert the water by that means.

At all events, the decision of the court is based entirely on the unsupported premise that the trial court did not find that this water was diverted out of the river and into the Drain ditch at times when it was unnecessary to drain water from the lands of the defendant Hanley.

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## VIII.

### CUTS IN THE BANK OF THE RIVER.

As to this matter this court assumes that these cuts were natural depressions and therefore there was no duty on Hanley's part to close them. Here, again, we respectfully submit that the court in so holding has disregarded the testimony of at least two witnesses as to the facts, and has also disregarded the admission of Hanley that he recognized that it was his duty to keep them closed. Griffing testified that these large cuts, diverting some fifty feet of water each, were artificial (Trans. pp. 97, 137-8). Gilcrest likewise testified that these cuts were artificial (Trans. pp. 164-170). Hanley, and all of his witnesses, showed that these cuts were equipped with poles, stakes, etc., for the purpose of controlling them, and Hanley tried in every way to show that he had kept them closed. Notwithstanding this testimony, this court now, by its decision, gives its permanent approval to leaving two of these cuts

open, each diverting fifty second feet of water. At the statutory duty of water of one cubic foot to eighty acres this water alone would irrigate eight thousand (8,000) acres of land, which is considerably more than all of the land owned by Hanley at the time of the entry of this decree. In other words, this court has permitted by its dismissal of this proceeding the maintenance of two cuts having all the appearance by the photographs and evidence of being artificial, testified by all the witnesses of the complainant to be artificial, and which the defendant himself has admitted he should have kept closed, and which he testified he did everything in his power to keep closed. This court, we say, has given its permanent approval to the right of the defendant to keep them open and to divert this or even greater quantities of water.

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## IX.

### AS TO OBSTRUCTIONS IN THE TWENTY-ONE DAM.

This matter is not so important as the others, because not of permanent consequence. The evidence showed that these obstructions raised the water in the river about a foot (Trans. p. 96). It does not make any difference whether this water was diverted into the Twenty-one ditch or into the Hanley Upper ditch, or out through some cut or whether it was diverted at all. This obstruction in the channel was not permitted by the decree. The court on sufficient evidence found it to exist in violation of the decree, but the court disregards all of this evidence simply because of the general testimony that from the first of April until the 3rd of

May the *average* amount diverted into the Upper Hanley ditch "would be very close to forty second feet". In other words, because an engineer testified that during a period of over a month the *average* amount diverted was forty feet, therefore the court draws the conclusion that he testified that during all of that period the same amount was diverted every day, and therefore the same amount diverted after this obstruction was removed, as well as before. We certainly submit that no such a conclusion can be arrived at. The river during that period rises and falls, and the amount diverted into the ditch would rise and fall, and the witness simply testified that the *average* amount during that period would be a certain amount, which was an ordinary engineering expression, and does not mean that the same amount was diverted during the entire period. But what is the use of arguing such a matter when the court knows as a hydraulic matter that if you raise the water in a stream a foot immediately below the head of a ditch it will necessarily divert about a foot more depth of water in the ditch. Even if a witness had testified that notwithstanding the raise of a foot the same amount flowed in the ditch, his testimony could not be believed because it would be absolutely against all reason and nature, and certainly the court has no right to assume that the witness testified that the same amount flowed when he simply testified to the average amount during the entire period.

Again, we respectfully submit that such a conclusion is not arrived at by giving proper or just weight to the finding of the trial judge.



## X.

**GENERAL CONSIDERATIONS.**

In the foregoing we have attempted to show that the court has based its decision on premises not supported by the record, but we can not expect a proper consideration of these important property rights if the court is to look at this matter in the manner indicated by the last paragraph of its decision. In this particular instance, at the only time in the year when the plaintiff is entitled under the terms of this decree to the waters of this river, the defendant W. D. Hanley was taking every drop of water of Silvies river. The plaintiff saw all of the water of the west fork of Silvies river put upon the lands of Luig, Thornberg and Hotchkiss, in express and direct violation of the decree. It saw all of the water of the east fork going out through the Drain ditch, the Upper Hanley ditch, and these cuts which Hanley claimed to control, but which were in fact entirely uncontrolled, beside being impeded by his dam, the abandoned timbers of his bridge, and by every artifice that could well be imagined, while the testimony shows that the complainant's lands were parched and dry; and still this court adds insult to injury by holding that in bringing this proceeding the complainant "has gone further than justice permitted" and "that it has magnified little things beyond their true proportions". In other words, the taking of all of the water of Silvies river at a time during which alone the complainant was entitled to receive it and putting it upon lands which were strictly inhibited from receiving it at that time, is a little thing, and to question it is

to go further than justice permits. If all of the water of Silvies river is a little thing, we are willing to concede this criticism; if the lands of complainant and their wants are a little thing, we are willing to concede this criticism. But we still intend to take the position that our lands and our rights are just as much entitled to protection as the rights of W. D. Hanley. Not only this, but the court goes further and says that the defendant W. D. Hanley "has at all times been disposed to deal fairly with the appellee". This court, in its decision reported in 200 Fed. 468, held that

"the provisions of the original decree have been evaded by both Hanley and Levens";

that

"Hanley clearly violated the provisions of the original decree by subsequently constructing in the Drain Ditch a stop gate", etc.,

and that in diverting water through the Drain ditch he

"has committed and does commit a clear violation thereof",

and beside those violations and contempts of court, the trial court had already held him guilty of contempt in various other particulars specified in the decree from which no appeal was even taken. Notwithstanding that decision of this court (dissented from, it is true, by Judge Gilbert), the court now gives an elaborate coat of whitewash to W. D. Hanley and says that at all times he has been disposed to deal fairly with the appellee, and all this is based on the statements of Hanley, held by the lower court to be entirely unsustained by the evidence. But not only this, the court proceeds to go on the supposition that if appellee had

known that W. D. Hanley was doing all of these things alone, this proceeding would not have been brought. In other words, the appellee sees the land of Luig irrigated by all of the water of the west fork of the river being turned onto the same in violation of the decree. It naturally draws the conclusion that this is not without the consent of Luig, but also being informed that Hanley was responsible for it, naturally proceeded against both, and now the court says that because the complainant was unable to prove that Luig was responsible that it would not have proceeded at all if it had known that Hanley alone did it. You might just as well say that because two men are proceeded against for murder and on the trial one of them admits the full responsibility that he should be acquitted and the proceeding dismissed because forsooth the prosecution was unable to establish a case against the one charged as a confederate, and you might just as well say that if the prosecution refused to take that position that it had gone further than justice permitted in proceeding at all. What difference does it make to the complainant if the water in violation of the decree is turned out of the west fork of the river onto the Luig land in violation of the decree whether it is done by Luig or by Hanley or anyone else who had knowledge of this decree? The complainant is not interested in who is violating this decree, but is interested in knowing whether it is violated, and it is deprived of the water and the water in violation of the decree is placed upon the land which is prohibited from using it. In the same way, the appellee saw the water by the Young dam in violation of

the decree turned onto the Thornberg and Hotchkiss land. It naturally assumed that Thornberg and Hotchkiss were cognizant of this and proved that to be a fact, but in that case Hanley took the other position and dodged responsibility and escaped punishment by testifying that he did not in fact take any water by means of the Young dam at all. Still the court says, which is absolutely contrary to the record, that the court found him guilty of contempt for using the Young dam. Here, again, we may have failed to prove all of the parties guilty of that particular offence, but those who were found guilty were adjudged guilty by the court, and the proper punishment meted out to them, and the lower court did not say because we had been unable to prove a case against all we therefore could get no relief against those who were guilty of the offence. But the court even takes advantage of the statement of the counsel for appellee to the effect that since he acquired knowledge of certain of the acts of Hanley while he was on the Hanley land at the invitation of Mr. Hanley he "felt a little reluctance about this matter of taking any proceedings on that matter at that time", and attempts to twist this into an admission that all of the things on the east fork would have been overlooked if it were not for the matters on the west fork. On the contrary, the record shows that immediately after counsel for the appellee learned of the conditions on the east fork, instead of immediately bringing such a proceeding, he took the matter up directly with the attorney for Mr. Hanley, Judge Webster (Typewritten Trans. p. 87), and this natural courtesy shown under the circumstances is

twisted by the court into a willingness on behalf of the appellee to allow unlimited quantities of water to be diverted by Hanley through the Drain ditch and through cuts in the bank of the river and to permit him to continue all kinds of obstructions in the river channel. We say that any one who would stand by with the admitted rights which this decree gives us and see the Luig land, the Thornberg land, the Hotchkiss land and the Hanley land taking all of the water of the river at the only time when the decree guaranteed the water to the complainant and do nothing to enforce his rights, would not be entitled to own any land or any right, nor to the respect of any person or any court, and we can not help but resent such a record as has been made in this case charging us with going further than justice permitted because we insist that our rights be respected and the decrees of the courts enforced and carried out.

The acts of Hanley which are shown by the record of this court to have been heretofore complained of by the appellee are as follows:

1. Shortly after the decree he cut the entire channel of the river away from appellee's land and constructed two solid dams across the channel, taking all of the water of the river away from appellee's land. These dams he was compelled to remove by the order of the court, which held that they were constructed in violation of the terms of the decree.

2. In 1906 he by means of dams turned a large part of the water of the river out into the sagebrush to the east of his property for some six miles where it was dumped into Poison creek slough and entirely away



from complainant's property. Judge Bean ordered the removal of the dam that caused that result.

3. At times of high water and at times of low water, and at times when complainant did not even have enough water for its stock, he diverted water through the Drain ditch, and this was held by this court to be a clear violation of the terms of the decree.

4. He conspired with Levens to evade the terms of the decree so as to take the water which Levens was entitled to divert down onto his section 31, and this was held by this court to be in violation of the decree, and an evasion of it.

5. In the teeth of the decree he constructed a stop-gate and an outlet gate in the Drain ditch for the purpose of irrigating his land, and this was held to be in violation of the decree, but notwithstanding this holding, the obstructions were not removed until a final decree was rendered by this court holding them to be in violation of the decree, and enjoining their removal.

6. The alleged violations of the decree involved in this proceeding have already been sufficiently reviewed, and we respectfully ask the court: In what one of the matters referred to above has the defendant W. D. Hanley "at all times been disposed to deal fairly with the appellee"?

Beside these matters there has been another matter the subject of friction between these parties. It appears to this court that Hanley is claiming the right to divert water out of the river and through the Drain

ditch because he claims that if it goes on down the river it will overflow the banks of the river and overflow his land, and still he has refused to make a proper and reasonable channel for the river down through his land and between his land and the complainant's land, although the complainant has time and again requested it to be done, and has, in fact, itself made a proper channel on its side of the river. Irrespective of any legal question, we ask this court if in this day and age it is considered to be dealing fair with a neighbor to say that you will take the water of the river away from him because if it comes down the channel it will overflow your land, when you are refusing to take the ordinary steps to improve the channel of the river by the construction of a proper levee, and thus prevent such overflow? Not only this, we showed on the hearing of this proceeding that we had not only offered to join in the construction of such a channel, but had offered to pay the expense that Hanley would be put to by reason of the construction of such a channel in the carriage of water from his other ditches to the land which would be thus reclaimed. He even denied on the stand that we had ever offered to do this, and we were able to produce the written letter to him offering to do this work for him. If this is a matter that this court deems it has a right to pass upon and say who has dealt fairly in the premises, we would like this court to answer the question: How anything could be more fair than that two adjoining owners of swamp land, which they are in duty bound to reclaim, should join together to reclaim them by the construction of a proper channel for

the river between them? And what could be more fair than the offer of one of those owners to pay all of the expense to the other owner which would be caused by being compelled to artificially irrigate his land rather than relying upon the natural irrigation of it by overflow, particularly when he himself is claiming that the natural overflow is such a detriment that by reason thereof he can take all of the water of the river away from his neighbor? And still this court says that the defendant has dealt fairly, and that the complainant has not proceeded in accordance with justice.

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#### CONCLUSION.

In concluding this petition we respectfully submit that on the merits the decision rendered herein is based on fundamental misconceptions of the record in this case, in the following particulars:

1. So far as the Luig dam was concerned, in the year in question, it was used in violation of the decree for the irrigation of the Luig land.
2. The assumption that the complaint in the original suit only referred to Hanley's right in the east fork of the river is without any foundation whatever.
3. The assumption that Hanley acquired any right or claims to have acquired any right in the Luig dam from Altschul has no support whatever in the record. Whatever right he has or claims to have he had at the time of the original decree.
4. The assumption that Hanley was held in contempt for using the Young dam is erroneous. The associates

of Young, Hotchkiss, and Thornberg were held in contempt for using it, as they clearly were, and Young was declared to have illegally constructed it, as he undoubtedly did, for the use of his land and was ordered to remove it.

5. The assumption that the trial court did not find that water was diverted into the Drain ditch when it was unnecessary to drain water from the lands of Hanley is directly contrary to the record.

6. The assumption that cuts in the bank of the river diverting fifty cubic feet of water were natural and properly left open is contrary to the testimony of two witnesses that they were artificial, and the testimony of the defendant that they had been and were controlled and closed by him.

7. The assumption that Mr. Griffing testified that the same amount of water flowed into the Hanley Upper ditch after the obstructions in the Twenty-one dam were removed as theretofore is based on a misapprehension of the record. He simply testified to the average flow during the entire period.

8. And finally we submit that the decision of this court acquitting Hanley of wrongs of which he has heretofore been found guilty by this court and by the District Court, and placing a stigma upon appellee for merely enforcing its rights as it conceives them in the courts established for that purpose, is unjust and should not be permitted to remain as a permanent record of this court.

We respectfully submit that a rehearing should be granted and that every charge on which the defendant was held to have violated the decree is sustained by the record in this case.

Dated, San Francisco,  
July 24, 1916.

WIRT MINOR,  
EDWARD F. TREADWELL,  
*Solicitors for Appellee  
and Petitioner.*

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CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

EDWARD F. TREADWELL,  
*Of Counsel for Appellee  
and Petitioner.*



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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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**WILLIAM HANLEY**  
APPELLANT

VS.

**THE PACIFIC LIVE STOCK COMPANY**  
a Corporation  
APPELLEE

---

**Brief for the Appellant Hanley  
Opposing the Petition for Rehearing**

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF OREGON FROM THE DECREE  
ENTERED AUGUST 3, 1915

---

**C. E. S. WOOD**  
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**Filed**

DEC 22 1916

**F. D. Monckton,**



# United States Circuit Court of Appeals

For the Ninth Circuit

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WILLIAM HANLEY,

*Appellant,*

*v.*

THE PACIFIC LIVE STOCK COMPANY,

a corporation,

*Appellee.*

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## Brief for the Appellant Hanley Opposing the Petition for Rehearing.

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*On Appeal from the District Court of the United  
States for the District of Oregon, from the  
Decree Entered August 3, 1915.*

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### ARGUMENT

Pursuant to your Honors' request we submit this brief in answer to the petition for rehearing. We understand that the only subject your Honors wish discussed is the drain ditch, and we shall confine ourselves to that.

In this brief "Transcript" means the printed record prepared by the Clerk of the District Court

at Portland, at the request of the appellant; "Appellee's Supplemental Transcript" refers to the printed record of additional parts of the testimony which the Clerk of the Circuit Court of Appeals prepared at the request of the appellee.

The petition for rehearing, as we understand it, makes two points. *First*, that this court is mistaken in regard to what the trial court found as to the necessity for using the drain ditch. *Second*, that the evidence is almost conclusive that Mr. Hanley's lands did not need drainage at the time the drain ditch was opened, because "during the very time" the drain ditch was taking thirty feet of water from the river, Mr. Hanley was using all of the water from both forks of the river to irrigate his lands.

We shall discuss these in their order.

## FIRST. THE FINDING OF THE TRIAL COURT.

The petition quotes the finding of the trial court "That during the months of March and April, 1915, and at times when it was unnecessary to drain water from the lands of William Hanley, the said defendant William Hanley, in violation of the terms of the said decree, permitted the head of the Hanley Drain Ditch to be open," etc.

This is the formal decree of the trial court prepared by the complainant's attorneys, on the basis of the trial court's opinion. So that we look at that opinion to find what Judge Wolverton actually held. His opinion, on pages 63-70 of the transcript of

record, deals with this matter, and while it is too long to quote, shows conclusively that his finding that the drain ditch was kept open unnecessarily was based on his other finding that Mr. Hanley was responsible for the brush at the 21 Dam and the breaks in the river bank and should have kept the breaks closed. He says in part:

“Before concluding whether this ditch was kept or allowed to remain open contrary to the spirit of the decree, it is necessary to examine in connection therewith the charges relating to Dam 21 and the cuts in the bank of the stream.”

He then proceeds to examine those charges and finds Mr. Hanley guilty of neglect in letting the brush accumulate at the dam, and in not keeping the cuts closed. And then, based on *this* finding, he concludes that Mr. Hanley was guilty in regard to the drain ditch, saying:

“Thus Hanley pleads the necessity for the opening of the drain ditch to rid his lands of the flood waters. But he himself, in my candid opinion, was responsible for the overflow of his own lands, and he cannot be heard to make a necessity for opening his drain ditch, and justify himself on that ground. He should have kept these breaks and gaps in the banks of the stream closed, or at least in very large measure. The just implications of the decree require this of him, as he is only given the flood waters to



May 5th, and water pouring through rents in the banks cannot be termed flood waters."

Your Honors then were perfectly correct when in your opinion you said: "But the court below reached the conclusion that the appellant had allowed the ditch to remain open contrary to the spirit of the decree for the reason that the appellant was responsible for the overflow of his own lands," and you were not, as the petition contends, mistaken as to the trial court's finding.

The trial court's finding means it was "unnecessary" to drain the lands because Hanley himself wrongfully created the necessity. Your Honors found that he did *not* create the necessity, and when your Honors found that, the underpinning was knocked from under the trial court's conclusion.

## SECOND POINT.

That Hanley was irrigating his lands at the very time he was draining them. In the language of the petition (p. 20) "the evidence showed that during the very time that Hanley had the head of the drain ditch open so that it would divert from the river at least thirty feet of water, he was himself diverting all of the water of the river, and of both forks, onto his land, for the purpose of irrigation. It therefore results that during the time when the Hanley land was being irrigated and all of the water of the river was being diverted for its irrigation, and that therefore it obviously needed irrigation and not drainage,

Hanley was diverting thirty feet of water from the river into the drain ditch."

This is a most erroneous and misleading statement, because it mixes up times and dates, and it mixes up lands. It says that "during the very time" that Hanley had the drain ditch open he was irrigating his lands, which is not a fact; it says that he was taking all the water of both forks of the river, which is not a fact either; and finally it ignores the distinction between low marshy lands, and higher meadow lands, which often makes it necessary to drain the low, while at the same time irrigating the high.

First, as to the times and dates. When the spring came and the ice in the channel broke up and the channel cleared, Hanley ordered the headgate of the drain ditch closed. (Transcript, pp. 191, 280.) It was early in April he ordered manure and stuff thrown against the boards so as to actually stop all water going through the drain ditch (Transcript, pp. 196, 288). Ryan put the additional boards in on the fifth of April, was gone one or two days, came back, found an undercurrent going under the boards, and threw in manure and stack bottom, and stopped the leak entirely. (Transcript, p. 288.) This would be, then, the seventh or eighth of April. Griffing, the *complainant's* engineer and star witness, admits that the last time he saw any water going through the headgate was *April 8th* (Transcript, pp. 100, 116), and Ben Newman, the *complainant's* ranch foreman, states, the same as Hanley's man Ryan,

that the headgate was closed tight by throwing hay and stuff against the boards on the 7th or 8th of April (Transcript, pp. 175, 177, 181).

*It may therefore be taken as conceded that by April 8th the headgate was closed tight and no water at all was going down the drain ditch.*

With this date in mind, then—April 8th—let us see when Hanley first commenced irrigating.

He did not commence irrigating from the Fennimore Dam, down on section 3 lower down the river, until "about the middle of April." This is testified to by Ryan, who was the man who actually operated the Fennimore Dam. (Transcript, p. 290, especially lower half of page.) This is confirmed by the date of the photograph of the Fennimore Dam taken by Mr. Griffing to show that it was being used—which date is April 14th. (Complainant's Exhibit 6.—See date on back.) And remember that Mr. Griffing is the *complainant's* witness who early in April (many of his photographs were taken on the 8th of April) was instructed to gather evidence for this contempt proceeding. He was up and down this river constantly, and it is reasonable to suppose that if he had seen the Fennimore Dam in use earlier than April 14th he would have photographed it. This irrigation from the Fennimore Dam, then, is twenty-five days after March 20th when McLaren put enough boards into the headgate of the drain ditch to make the river overflow its banks (Transcript, p. 280), (and it does not seem as if there would be any use in putting in any more, because when the

water overflows the river banks, part of it, at least, drops into the drain ditch anyway). This irrigation from the Fennimore Dam is *nine days* after April 5th, when Ryan put all the boards in the drain ditch headgate, and it is *six days* after April 8th, when everybody admits the leaks through the boards of the drain ditch were sealed up with manure and old hay, and every drop of water was shut out of the drain ditch.

Next take the 31 Dam, sometimes called the Luig Dam. The only evidence that the writer can find in the entire record as to the date of its use is that it was being used on *April 24th* —*sixteen days* after the drain ditch headgate was plugged up so tight there was not even a leak through it. I refer to the testimony of Mr. Griffing (Appellee's Supplemental Transcript, p. 8), and of Mr. Treadwell (Transcript, pp. 147-148).

The only other place counsel can have in mind when he says that "during the very time" Hanley had the drain ditch open, he was using all the water of both forks of the river for irrigation, is the Upper Hanley Ditch; so we turn our attention to that.

And the first thing to notice is that there is no evidence that any water was going down it earlier than "the first part of April." The testimony of Mr. Griffing is the testimony that goes back the furthest in dates on the running of water into this ditch, and the earliest he places it is "the first part of April." (Transcript, bottom of p. 94, top p. 96, middle p. 126, and p. 135.) It is true that on page



94 he says the water was running into the ditch from "the first of April up until the first of May—3rd of May"; but his other testimony makes it clear that he means here not the first *day* of April, but merely the first *part* of the month. For example, on page 96 he says it was "about the first part of April," and on page 126 he says again that the first time he saw the brush in the 21 Dam was "in the first part of April." All of which is confirmed by the fact that he did not get his instructions to gather this evidence until "the first part of April" (Transcript, p. 135). The photograph he took of the 21 Dam appears to have been taken April 8th, (Transcript, p. 127). Yet this is the very day that the drain ditch headgate is conceded to have been plugged up tight.

Therefore this Upper Hanley Ditch is in the same category with the Fennimore Dam and the 31 Dam. No water was taken through it "during the very time," as counsel contends, that the drain ditch was being used. Apparently Griffing took his photographs of the drain ditch and the 21 Dam on the same date—April 8th—and a few hours after he had photographed the drain ditch Hanley's man came along and plugged the leaks in the drain ditch tight with the old hay and stuff. So that it is possible that for a few hours on that day water was leaking through the drain ditch headgate, simultaneously with the running of water into the Upper Hanley Ditch. But this, if true, lasted but a few hours. And remember that an honest and practi-



cally successful effort was made by Ryan to close the drain ditch on April 5th—three days before this time.

Parenthetically we would like to interject here an observation on headgates, and the difficulty of keeping them absolutely tight. It is known to every irrigator to be a difficult thing to do. The pressure of water against a gate is tremendous, and almost invariably there is some leak, either through the wings of the gate, underneath it, or through the boards, if they are not jammed down tight, which is sometimes hard to do. Modern irrigation engineers recognize this, and most headgates now in large projects are made of cement, with gates raised and lowered by screws. But Harney Valley is still a pioneer country. It is only within the last year that a railroad has penetrated to the rim of the valley, and it is still thirty miles from Burns. All of the gates in that valley are made of timber, just exactly like the headgate of the drain ditch, and the difficulty of keeping them absolutely tight is ever present. That Hanley has tried to do so is shown by the fact that he built a new headgate at the drain ditch the fall before this proceeding was commenced, and when that leaked he threw the old hay and stuff in in front of it to make it tight.

To conclude this phase of the discussion then, there is no evidence anywhere that Hanley was diverting water from the river for irrigation "during the very time," in counsel's phrase, that he was taking water out through the drain ditch. Indeed

the evidence is quite the contrary, and is to the effect that he was not irrigating anywhere until *after* the drain ditch was closed.

Furthermore, there is no evidence anywhere, that I know of, that any of the water going down the Upper Hanley ditch was being used for irrigation. This is perhaps not so important, since, by straightening counsel out on the dates, we have demolished his contention that Hanley was irrigating and draining at the same time. Nevertheless, since his argument is based on the assumption that Hanley was *irrigating*, we say that, as to the Upper Hanley ditch, there is no evidence that he was irrigating at all. He may have been irrigating, he may have been running the water there for stock water, or he may have been using it to wash alkali off some land on the eastern side of his ranch that is alkalied and he is reclaiming to meadow, or he may have had some other reason which we do not know. But that he was irrigating is pure supposition.

It is well to bear in mind his right to have water run down the Upper Hanley ditch at *any* time and for *any* purpose, when it will flow there without the aid of the 21 Dam. The decree is:

"If at any time and while the dam of the said W. D. Hanley is open so that it does not obstruct the flow of the water in said river and from natural causes the waters of said east fork of Silvies River shall \* \* \* naturally run through either of the ditches of the said

W. D. Hanley leading from the dam of the said W. D. Hanley first above described, said defendant W. D. Hanley shall have the use and enjoyment of so much of the said water of said river as may come upon his land in the manner aforesaid and during such time as the same may run thereon from natural causes and without any obstruction of the channel of said river."

We now come to our discussion of the other fallacy in the complainant's argument--namely, the fallacy of mixing up the lands. Complainant says: "Hanley was irrigating; therefore, by his own act, he has proved he didn't need drainage." This argument assumes that if any one piece of land of all the ten thousand acres of the Hanley ranch is being irrigated, it necessarily follows that all the rest of the ten thousand acres need irrigation likewise, and therefore it is impossible that any of it should need drainage. Hence, if any irrigation was going on at any part of the ten thousand acres at the same time that the drain ditch was being used on another part, it is, according to complainant, conclusive evidence that the drain ditch was being used in violation of the decree. To state this proposition is to refute it. Nevertheless, we shall go further and dissect it a little. Let us forget, for a moment, what we have said about the dates, and assume that irrigation was actually going on at some parts of the ranch at the same time the drain ditch was open. Where was this irrigation? Counsel points out three places.

The 31 Dam, the Fennimore Dam, and the Upper Hanley Ditch—*every one* of them serving lands of a different character than the drain ditch lands. The 31 Dam is even on a different fork of the river. The lands irrigated from these sources are lands that have always been *meadow*; they are *higher* lands. Section 31, on the west fork, is one of the oldest hay sections in Harney Valley. Stenger built his dam to irrigate it in '87 (Transcript, p. 186). The same with the lands along the Upper Hanley Ditch, they are higher meadow lands. Originally they were partly meadow and partly sage brush. The same with Section 3, served by the Fennimore Dam. It is, and always has been, a meadow section. The very presence of the dams and ditches to irrigate these lands shows that they need irrigation, not drainage,—that they are, and were originally, meadow lands.

But what about the drain ditch lands—the southeast part of 27, the southwest part of 26, and all of 35? This record is crammed full of testimony that they are a *basin*, a *shallow saucer* in the inclined plane of Harney Valley as it slopes to the southeast, and that they were originally a *tule marsh*, entirely unproductive until the drain ditch was built along the northern rim of the saucer to divert some of the river around the saucer and return it to the river *through* Embree Slough, and thus keep the saucer partly dry. *Then* the saucer began to make hay. But it needs *drainage*, and it needs it while other lands need irrigation. The

record is full of references to this fact that this land was a tule marsh. (Transcript, pp. 196, 158, 162, 163, 166.) But it is nowhere better expressed than in the words of *complainant's* own superintendent, Mr. Gilcrest: "That is a basin—the lowest depression in that whole territory—34 and 35." (Transcript, p. 163.)

To say, then, that because irrigation is going on in some other part of Harney Valley, is conclusive proof that it was unnecessary to use the drain ditch, is illogical. It is missing the distinction between different kinds of lands.

#### THE CHARGE THAT HANLEY WAS TAKING ALL THE WATER OF THE RIVER.

It really is not necessary to discuss this. But we touch it lightly in passing just to show the inaccuracy of the statements in the petition for rehearing. The statement is that "during the very time that Hanley had the head of the drain ditch open so that it would divert from the river at least thirty feet of water, he was himself diverting *all of the water of the river* and of both forks onto his land for the purpose of irrigation."

We have shown, in straightening out the dates, that at the time Hanley had the drain ditch open, he was not diverting any water at all *anywhere* for the purpose of irrigation. But pass that by. Let us go forward to that later date, after the drain ditch was closed, when Hanley *was* diverting



water. How much was he diverting? We will take Griffing's own figures—forty-two second feet at 31 Dam (Appellee's Supplemental Transcript, p. 9); forty second feet into the Upper Hanley Ditch (Transcript, p. 94); and an indeterminate amount at the Femmore Dam, which Hanley's men got part of the time, and the complainant's men got part of the time (Transcript, p. 290). This makes seventy-one second feet, plus the indefinite amount at the Femmore Dam, which Hanley's men and the complainant's men were unwillingly sharing with each other. (We omit the breaks in the banks because they were not diversions and Hanley was trying to stop them.) The foregoing figures are Mr. Griffing's. Yet during this period Griffing says the flow of the river averaged *four hundred and twenty-eight second feet* (Appellee's Supplemental Transcript, p. 7). And of this amount the complainant itself was getting *ninety second feet* at one place alone—the Orphan Ditch (Transcript, p. 108). This was water partly diverted through the Orphan Headgate and partly coming from the breaks in the river bank and the overflow in Section 27. And the complainant carried it westward and used it on its own Sections 33 and 4 (Transcript, pp. 105-106), and thence it went into Chapman Slough and was used by the complainant again.

And indeed it is important to remember that nearly all water that gets out of the river banks on the upper reaches of the river, whether by overflow or diversion, comes back onto the complain-

ant's lands below and is used by it. Even the water that goes through the drain ditch is used by the complainant on Sections 26 and 36, before it has gone down the ditch a mile, and when it is dropped into Embree Slough it goes back into the river again only about six miles below where it was taken out. (Complainant says sixteen miles [see petition for rehearing, p. 23], but consult the map attached to the transcript in this appeal.) And while this six-mile point is below complainant's Mace Dam, yet it is above complainant's other points of diversion, and above the main body of complainant's lands.

So that when complainant speaks about others taking "all the water of the river" it is well to accept the statement with reserve.

A few miscellaneous observations yet remain.

The decree gives Hanley the right to use the drain ditch whenever it is necessary to drain water from the surface of his lands. Mr. Griffing makes one statement which, of itself alone, is sufficient to exonerate Mr. Hanley in this whole matter, and that is that at the very time the water was going down the drain ditch, the river was overflowing the banks and flooding Section 27 east of the river and Section 35. Griffing says:

"Q. Was there any water down on 35 at that time, below the drain ditch and in 27?

"A. Yes, some.

"Q. Overflowing the banks there, wasn't it,

covering a good deal of 35, and part of 24 (27) east of the river?

“A. Yes, water was overflowing the banks there.”

(Transcript, pp. 115-116.)

If Hanley wants to keep the water off these lands and cannot use the drain ditch to do so, under the conditions just narrated by Mr. Griffing, then when can he use the drain ditch?

It is stated in the petition for rehearing (p. 23) that Hanley took the position in his sworn affidavit that he had not diverted any water during the period in which it afterward appeared he had diverted water. This is hardly a fair statement either as it seems to us. His position was that after talking with his counsel in Portland “about the middle of March,” he returned to Harney Valley and ordered the drain ditch closed and it was done, even though in so doing he suffered great damage by overwatering his low lands. He did not in his affidavit state any definite date when the drain ditch was absolutely closed. He said it was after discussing the matter in Portland with C. E. S. Wood “about the middle of March.” His actual language is (Transcript, p. 32) “about the middle of March I consulted with one of my counsel, Mr. C. E. S. Wood, as to what could be done to remove all cause of complaint against me by the Pacific Live Stock Company and if possible to start the commencement of a neighborly feeling, and

after such consultation I returned to Harney Valley and gave instructions which were carried out, that the head of the drain ditch was to be sealed water tight," etc. It is true that later on in the affidavit (p. 38 of the Transcript) he says that "about the middle of March, after talking with counsel, C. E. S. Wood, in Portland," the drain ditch was closed tight. But this is only an approximation of time: "about the middle of March" was purposely used because he did not know the exact date. And taking the language as a whole it is apparent what he means is that he *consulted with counsel in Portland about the middle of March*, and then returned home and gave his orders. Is this inconsistent with the facts as they appeared at the trial, namely, that McLaren put boards in the headgate about the 20th of March enough to flood the water over the banks? And that Ryan was ordered by Hanley early in April to take no chances but to put all the boards in and throw stack bottom and manure against them, which he did on the 5th and 8th of April? Is there such a discrepancy in time between consulting his counsel in Portland "about the middle of March" and closing the drain ditch tight on the dates stated in April as to warrant the contention that Hanley took a position in his affidavit which the proof at the trial rendered untenable? Especially when you consider the circumstances under which the affidavit was drawn—Hanley, all unsuspecting, served in Portland with an order to appear and show cause at a date only

a few days off, the necessity he was under to return to Burns, and so, in doubt whether he could get back in time to appear in person, the affidavit drawn hurriedly by C. E. S. Wood. As Hanley says in the affidavit itself—"I am making this affidavit now away from Burns and sources of information because of the short time in which I am allowed to appear and show cause." (Transcript, p. 43.)

It is stated in the petition for rehearing (p. 23) that "on the trial of this case Hanley did not claim that during this period it was either necessary or proper for him to divert water through the drain ditch."

This is really incomprehensible to the writer of this brief; for Hanley claimed not only that it *was* necessary for him to divert water through the drain ditch, on account of the cattle he was feeding on 27 and 35, but that after that, it was very necessary and proper to divert water down the drain ditch, and to do so would have benefited his lands greatly, but that he, following his deliberate program of conciliating the Pacific Live Stock Company, chose to forego his right and close the drain ditch, and thereby he suffered a great detriment in the excessive watering and overflowing of his low lands. (Transcript, pp. 37-38, 193-198, especially 196, and 258). And anyone who doubts his statement need only look at the photograph Mr. Griffing took of the water standing a foot and a half deep on Section 27 on April 20th (Complain-



ant's Ex. 23; see also Transcript, p. 109), and need only remember Mr. Treadwell's statement that on April 18th the lower part of Section 27, where he stood with Mr. Hanley, was "a sea of water." (Transcript, p. 144.)

So we say it is incomprehensible to us to state that "on the trial of this case Hanley did not claim that during this period it was either necessary or proper for him to divert water through the drain ditch."

In conclusion we wish to emphasize that Mr. Hanley, so far from using this drain ditch in violation of the decree, was making every effort not to use it so, and was willing to suffer injuries to his low lands and forego his right to use the ditch if he could only get on a friendly basis with his neighbor, this complainant. This seems such an obvious fact in this record, and it ought to be so controlling in deciding whether there was any violation of the decree or any intent to violate it, that we dwell on it a moment in closing. Look what Mr. Hanley did—and none of it is disputed. He consulted his counsel as to the best way to remove friction with the Pacific Live Stock Company. He goes to San Francisco to see Mr. Treadwell, for the purpose of taking the matter up with him and trying to reach a harmonious working arrangement. He gives positive and specific orders to keep the drain ditch closed, and even goes to the length of ordering the old hay and stuff thrown in, so there will not be any leaks. And pursuant to these

orders the headgate is closed tight during all the flood season, so that the Pacific Live Stock Company can get the flood waters they so much desire, even though this results in over-watering Hanley's lands. Remember in this connection that the whole theory of the stipulations on which the original decree was entered, was that if the Pacific Live Stock Company could get the floodwaters it was satisfied. Even, therefore, if the headgate were not closed water tight till April 8th, Hanley had reason to suppose that if it were closed then, in time to send the floodwaters on to complainant, the complainant would be satisfied. His keeping it closed during the flood, to the detriment of his own low lands, is rendered still stronger evidence of his desire to get along peaceably with the complainant, when you remember that the flood on his low land was increased by the Orphan Ditch levee backing the water over this low land, and that Mr. Hanley regards this Orphan Ditch levee and consequent backing of water over him as the most flagrant violation of his rights by the complainant. Yet notwithstanding the provocation this gave him, he did not open his drain ditch to relieve against it. Instead he took Mr. Treadwell down past the drain ditch to the Orphan Headgate on April 18th and showed him the conditions (Treadwell, Transcript pp. 143, 144). Is not that evidence of his trying to get on peaceably with this complainant? And that is not the end of his efforts. A week later, April 25th, a Sunday, he went down

to the Island Ranch—the Pacific Live Stock Company's headquarters—to see Mr. Treadwell. (Transcript, p. 147.) It was the first time he had “been on this ranch for twenty years, by invitation” (Transcript, p. 211)—a place that for years had been unfriendly to him, yet he went in pursuance of his determination to make a peace.

None of these things are disputed. Mr. Hanley's frame of mind is apparent from them. And it is unbelievable that a man in that frame of mind would have used the drain ditch at a time when it was unnecessary to do so. That would be contrary to his whole intent, and would upset his whole plan of conciliation. It would have been a crude blunder,—and Mr. Hanley is not a blunderer.

Finally, we should like the court to know that despite the failures of the past, and on the renewed invitation of Mr. Hanley, the parties to this controversy are now mutually engaged in striving to reach a settlement of their differences and to live henceforth in a peaceful and more neighborly understanding.

Respectfully submitted.

C. E. S. WOOD,  
LIONEL R. WEBSTER,  
ERSKINE WOOD,

*Attorneys for the Defendant and  
Appellant William Hanley.*



United States  
Circuit Court of Appeals

For the Ninth Circuit.

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MARY MURRAY and LENA MURRAY, a Minor,  
by Her Guardian Ad Litem, MARY MURRAY,

Plaintiffs in Error,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court  
of the Southern District of California,  
Southern Division.

Filed

FEB 14 1916

F. D. Munckton,  
Clerk.





United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

MARY MURRAY and LENA MURRAY, a Minor,  
by Her Guardian Ad Litem, MARY MUR-  
RAY,

Plaintiffs in Error,  
vs.

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tion,

Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court  
of the Southern District of California,  
Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**Names and Addresses of Attorneys.**

For Plaintiffs in Error:

MILTON K. YOUNG, Esq., 716 Union Oil  
Bldg., Los Angeles, California.

THEODORE A. BELL, Esq., San Francisco,  
California.

For Defendant in Error:

Messrs. HENRY T. GAGE and W. I. GIL-  
BERT, 1206-10 Merchants Nat. Bank  
Bldg., Los Angeles, California. [4\*]

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*In the District Court of the United States, Ninth Cir-  
cuit, in and for the Southern District of Cali-  
fornia, Southern Division.*

MARY MURRAY and LENA MURRAY, a Minor,  
by Her Guardian *ad Litem*, MARY MUR-  
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

**Writ of Error [Original].**

United States of America,—ss.

The President of the United States of America, to  
the Judges of the Circuit Court of the United  
States, of the Ninth Circuit, in and for the  
Southern District of California, Greeting:

Because in the record and proceedings, and also

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\*Page number appearing at foot of page of original certified Record.

in the rendition of the judgment of a plea which is in the said Circuit Court before you, between Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, plaintiffs in error, and Southern Pacific Company, a corporation, defendant in error, a manifest error hath appeared to the great damage of said plaintiffs in error, Mary Murray and Lena Murray, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco in the State of California, [5] on the 3d day of December, 1915, in the Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid be inspected, the said United States Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 4th day of November, in the year of our Lord one thousand nine hundred and fifteen and of the Independence of the

United States the one hundred and thirty-ninth.

[Seal]

WM. M. VAN DYKE,

Clerk of the Circuit Court of the United States of  
the Ninth Circuit, in and for the Southern Dis-  
trict of California.

By Chas. N. Williams,

Deputy Clerk.

The above writ of error is hereby allowed.

BENJAMIN F. BLEDSOE,

Judge. [6]

[Endorsed]: No. 279—Civ. In the District Court  
of the United States, Ninth Circuit, in and for the  
Southern District of California, Southern Division.  
Mary Murray et al., Plaintiffs, vs. Southern Pacific  
Company, a Corporation, Defendant. Writ of  
Error. Filed Nov. 9, 1915. Wm. M. Van Dyke,  
Clerk. By R. S. Zimmerman, Deputy Clerk. [7]

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*In the District Court of the United States, Ninth Cir-  
cuit, in and for the Southern District of Cali-  
fornia, Southern Division.*

MARY MURRAY and LENA MURRAY, a Minor,  
by Her Guardian *ad Litem*, MARY MUR-  
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.



**Citation [Original].**

To the Southern Pacific Company, a Corporation,  
Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, on the 3d day of December, 1915, pursuant to a writ of error on file in the clerk's office of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Southern District of California, in that certain action No. 279, wherein Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment given, made and rendered against the said plaintiffs Mary Murray and Lena Murray, in said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable BENJAMIN F. BLEDSOE, United States District Judge of the Southern District of California, this 8 day of November, 1915, and of the Independence of the United States the one hundred and thirty-ninth.

BENJAMIN F. BLEDSOE,  
United States District Judge for the Southern District of California. [8]

[Endorsed]: #219—Civil. In the District Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division.

Mary Murray et al., Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Citation. Filed Nov. 9, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk.

Received copy of within this 9th day of November,

HENRY T. GAGE.

W. I. GILBERT. [9]

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*In the District Court of the United States of America, in and for the Southern District of California, Southern Division.*

No. 279—CIVIL.

MARY MURRAY and LENA MURRAY, a Minor,  
by Her Guardian *ad Litem*, MARY MURRAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant. [10]

*In the Superior Court of the State of California, in and for the County of San Luis Obispo.*

No. 5454.

MARY MURRAY and LENA MURRAY, a Minor,  
by Her Guardian *ad Litem*, MARY MURRAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

**Certified Copy of Transcript of Record on Removal.**  
[11]

*In the Superior Court of the State of California, in  
and for the County of San Luis Obispo.*

No. 5454.

MARY MURRAY and LENA MURRAY, a Minor,  
by Her Guardian *ad Litem*, MARY MUR-  
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

**Complaint.**

Plaintiffs complain of the defendant and for cause  
of action allege:

I.

That the plaintiff Lena Murray is a minor of the  
age of eleven years, and that on the 11th day of July,  
1913, by an order duly made and entered in the above-  
entitled court, the said Mary Murray was duly and  
regularly appointed guardian *ad litem* to represent  
said minor in the prosecution of this action.

II.

That the plaintiff Mary Murray is the surviving  
wife of Henry Murray, deceased; that said Lena  
Murray is the only child of said deceased; and that  
the plaintiffs herein are the only heirs at law of said  
deceased.

## III.

That the defendant now is and at all times herein mentioned was a railroad corporation organized and existing under and by virtue of the laws of the State of Kentucky.

## IV. [12]

That on May 30th, 1913, and for several years immediately prior thereto, the defendant owned and operated a steam railroad in the State of California, running from San Francisco southerly to Los Angeles, and upon which line of railroad the defendant operated regular passenger trains for the transportation of persons for hire.

## V.

That on the afternoon of May 30th, 1913, the said Henry Murray, hereinafter referred to as Murray, took passage upon one of the defendant's passenger trains from San Francisco to Santa Margarita, a way station on said line of railroad, and paid to the defendant the fixed and established fare for his transportation between said last two mentioned points.

## VI.

That at all times herein mentioned it was the rule, custom and practice of the defendant to discharge its passengers at said way station in the night-time upon the east side of its trains only, where sufficient lights were provided and maintained by the defendant for the convenience and safety of passengers alighting from said trains; and that no lights of any kind or character were provided or maintained by the defendant at said way station on the west side of said trains.

## VII.

That on the evening of May 30th, 1913, at about ten o'clock, and as said train was approaching said way station, the said Murray, who was then seated in the smoking-car of said train, was invited and directed by one E. M. Mulville, then and there employed as a brakeman on said passenger train by the defendant, [13] to follow said brakeman to the front platform of the car immediately behind said smoking-car, and to alight from said train; that by reason of said invitation and direction, and not otherwise, said Murray immediately followed said brakeman to said platform, whereupon the said brakeman lifted up and opened a trap-door that closed and covered the steps that led down from said platform on the west side of the train, and while said train was moving into said station at the rate of about twenty miles per hour, the said brakeman directed the said Murray to descend said steps and to alight from said train; that, as was then and there well known by said brakeman, said Murray was wholly unfamiliar with said station, its grounds and approaches, and wholly ignorant of the rule, custom and practice of discharging passengers, in the night-time, only on the east side of said train at said way station; and said Murray did not know that no lights were provided or maintained on the west side of said trains at said way station; that there was not sufficient light, either upon said train or at said station, to enable said Murray to descend said steps with safety, all of which was then and there well known to said brakeman at the time he opened said trap-door and directed the



said Murray to descend said steps and get off said train; that by reason of said invitation and direction of said brakeman, given and made by him to said Murray at the time and in the manner aforesaid, and replying upon the said conduct of said brakeman, and believing therefrom that he could descend said steps and alight from said train with safety, the said Murray, in the presence of said brakeman, proceeded to descend said steps; that said brakeman, with full knowledge of the dangerous position in which he had caused said Murray to be placed, wholly failed and omitted to warn or caution the said Murray of the danger and peril thereof; that said Murray, in so descending [14] said steps, lost his foothold thereon, by reason of the insufficient light and the motion of said train, and fell to the ground with great force and violence, thereby sustaining physical injuries from which he died the following day.

#### VIII.

That each and all of the aforesaid acts and omissions of said brakeman were negligently done and omitted, and in negligent disregard of the duty which the defendant owed to said Murray as a passenger upon said train, as aforesaid; and that the injuries to said Murray, resulting in his death, as aforesaid, were not caused by any neglect or fault upon the part of said deceased.

#### IX.

That all of the matters and things set forth in paragraph VII of this complaint occurred in the county of San Luis Obispo, State of California.

#### X.

That plaintiffs have been damaged in the premises

in the sum of fifty thousand dollars (\$50,000).

WHEREFORE plaintiffs pray judgment for the sum of fifty thousand dollars, and for costs of suit.

THEODORE A. BELL,  
Attorney for Plaintiff.

LAMY & PUTNAM,  
Of Counsel.

[Endorsed]: Filed Aug. 11th, 1913. F. J. Rodrigues, Clerk. [15]

---

*In the Superior Court of the State of California, in  
and for the County of San Luis Obispo.*

No. 5454.

MARY MURRAY and LENA MURRAY, a Minor,  
by Her Guardian *ad Litem*, MARY MURRAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

**Demurrer to Complaint.**

The defendant, Southern Pacific Company, a corporation, demurs to the complaint of plaintiffs on file in the above-entitled action and as ground of demurrer thereto it specifies:

That said complaint does not state facts sufficient to constitute a cause of action.

W. H. SPENCER,  
Attorney for Defendant.

[Endorsed]: Copy of the within demurrer received this 11th day of October, 1913.

THEO. A. BELL, J.,  
Attorney for Plaintiffs.

LAMY & PUTNAM,  
Of Counsel, J.

[Endorsed]: Filed October 15th, 1913. F. J. Rodrigues, Clerk. —————, Deputy Clerk. [16]

---

*In the Superior Court of the State of California, in  
and for the County of San Luis Obispo.*

No. 5454.

MARY MURRAY and LENA MURRAY, a Minor,  
by Her Guardian *ad Litem*, MARY MURRAY,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.

**Petition for Removal of Cause to United States  
District Court.**

To the Honorable, The Superior Court of the State  
of California, in and for the County of San Luis  
Obispo:

Your petitioner, Southern Pacific Company, respectfully shows:

I.

That it is the defendant in the above-entitled suit or action. Said suit, as appears from the complaint therein, is of a civil nature at law brought by plain-

tiff to recover judgment against defendant, your petitioner, in the sum of Fifty Thousand Dollars (\$50,000), and costs of suit, which claim your petitioner wholly contests and denies, and alleges that the amount involved in said action, exclusive of interest and costs, exceeds the value of Three Thousand Dollars. [17]

## II.

That at the time of the commencement of said suit, said Southern Pacific Company, your petitioner, was, ever since has been and still is, a railroad corporation incorporated and existing under the laws of the State of Kentucky and a citizen and resident of said State and a nonresident of the State of California. At the time of the commencement of said suit, plaintiffs Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, and Lena Murray were, ever since have been and now are citizens of the State of California and residents of the Northern District of said State.

## III.

At the time of the commencement of this suit, there was, ever since has been and still is, therein, a controversy wholly between citizens of different states which can be fully determined between them, that is to say, between plaintiffs, Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, and Southern Pacific Company, defendant and petitioner herein.

## IV.

Service of summons was made in said suit on your petitioner on the 16th day of September, 1913, and

not before said day, in the city and county of San Francisco, State of California, and your petitioner is not required by the laws of the State of California, or the rules of the above-named Superior Court in which said suit is brought, to answer or plead to the complaint of plaintiffs therein until the 16th day of October, 1913.

V.

Your petitioner files and offers herewith its bonds with good and sufficient surety for its entering in the District Court [18] of the United States, Southern Division of Southern District of California, within thirty days from the date of filing of said petition for removal of said cause, a certified copy of the record in said suit and for paying all costs that may be awarded by the said District Court if said Court shall hold that said suit was wrongfully or improperly removed thereto.

WHEREFORE, your petitioner prays this Honorable Court to accept said bond as good and sufficient and to make its order for the removal of said cause to the District Court of the United States for the Southern Division of the Southern District of California, pursuant to the Act of Congress in such cases made and provided, and such other and further order as may be proper, and to cause the record herein to be removed to said District Court and that no other or further proceedings be had in said Superior Court.

SOUTHERN PACIFIC COMPANY.

[Corporate Seal]

By G. L. KING,  
Assistant Secretary.

W. H. SPENCER,

Attorney for Petitioner. [19]



State of California,  
City and County of San Francisco,—ss.

G. L. King, being duly sworn, deposes and says:  
That he is an officer, to wit, the assistant secretary of  
Southern Pacific Company, petitioner named herein;  
that he has read the foregoing petition and knows the  
contents thereof and that said petition is true of his  
own knowledge, except as to the matters which are  
therein stated on his information or belief, and as to  
those matters he believes it to be true.

G. L. KING.

Subscribed and sworn to before me this 11th day  
of October, 1913.

[Notarial Seal]

E. B. RYAN,

Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed October 15th, 1913. F. J. Rod-  
rigues, Clerk. By T. A. Luttrell, Deputy Clerk.  
[20]

---

*In the Superior Court of the State of California, in  
and for the County of San Luis Obispo.*

No. 5454.

MARY MURRAY and LENA MURRAY, a Minor,  
by Her Guardian *ad Litem*, MARY MUR-  
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

**Bond for Removal.**

KNOW ALL MEN BY THESE PRESENTS: That Southern Pacific Company, a corporation duly incorporated and existing under laws of the State of Kentucky, and a resident of said State, as principal, and United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, which said corporation has complied with the laws of the State of California with reference to doing and transacting business in said State of California, as surety, are held and firmly bound unto Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, plaintiffs in the above-entitled action, in the penal sum of One Thousand Dollars (\$1,000), for payment whereof well and truly to be made unto said Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, their heirs, executors, administrators or assigns, we bind ourselves, our successors and assigns, jointly and severally firmly by these presents. [21]

Sealed with our seals and dated in the city and county of San Francisco, State of California, this 11th day of October, 1913.

WHEREAS said Southern Pacific Company has petitioned, or is about to petition, the above-named Superior Court for the removal of the above-entitled cause or action therein pending, wherein said Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, are plaintiffs, and said Southern Pacific Company is defendant, to the District Court of the United States for the Southern

Division of the Southern District of California;

NOW, the condition of this obligation is such that if the said defendant, Southern Pacific Company, shall enter in said District Court of the United States in and for the Southern Division of the Southern District of California, within thirty days from the date of filing said petition for removal of said cause, a certified copy of the record in the above-entitled suit or action and shall pay all costs that may be awarded by said District Court if said District Court shall hold that said suit was wrongfully or improperly removed thereto, and shall appear and enter special bail in said suit if special bail was originally requisite therein, then the above obligation shall be void, otherwise it shall remain in full force and effect.

WITNESS our hands and seals the day and year first above written.

SOUTHERN PACIFIC COMPANY.

[Corporate Seal]

By G. L. KING,  
Assistant Secretary.

UNITED STATES FIDELITY AND  
GUARANTY COMPANY.

By H. V. D. JOHNS,  
Attorney in Fact.

[Corporate Seal]

W. S. ALEXANDER,  
Attorney in Fact. [22]

State of California,

City and County of San Francisco,—ss.

On this 11th day of October, 1913, before me, E. B. Ryan, a notary public in and for the city and county of San Francisco, State of California, duly commissioned and sworn, personally appeared G. L. King,

known to me to be the assistant secretary of Southern Pacific Company, the corporation described in and that executed the foregoing bond, and acknowledged to me that said corporation executed said bond.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed by official seal at my office in the city and county of San Francisco, State of California, the day and year in this certificate first above written.

[Notarial Seal] E. B. RYAN,  
Notary Public in and for the City and County of  
San Francisco, State of California. [23]

State of California,  
City and County of San Francisco,—ss.

On this 11th day of October, 1913, before me personally appeared H. V. D. Johns and W. S. Alexander, known to me to be the persons whose names are subscribed to the foregoing instrument as attorneys in fact for the United States Fidelity and Guaranty Company, and they acknowledged to me that they subscribed the name of the United States Fidelity and Guaranty Company thereto as principal, and their own names as attorneys in fact.

[Notarial Seal] W. W. HEALEY,  
Notary Public in and for the City and County of  
San Francisco, State of California.

The foregoing bond is hereby approved this October 15th, 1913.

E. P. UNANGST,  
Judge.

Filed October 15th, 1913. F. J. Rodrigues, Clerk.  
By T. A. Luttrell, Deputy Clerk. [24]

*In the Superior Court of the State of California, in  
and for the County of San Luis Obispo.*

No. 5454.

MARY MURRAY and LENA MURRAY, a Minor,  
by Her Guardian *ad Litem*, MARY MUR-  
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

**Notice of Petition for Removal.**

To the Above-named Plaintiffs and to Theodore A.  
Bell, Esquire, Attorney for Plaintiffs:

You, and each of you, will please take notice that Southern Pacific Company, the defendant in the above-entitled action, will on the 15th day of October, 1913, at 10 o'clock A. M., petition the above-entitled Court to remove said cause to the District Court of the United States in and for the Southern Division of the Southern District of California, by filing a petition and bond, copies of which are hereto attached and made a part hereof, reference to which is hereby expressly made for further particulars.

Dated October 11th, 1913.

W. H. SPENCER,

Attorney for Petitioner. [25]

[Endorsed]: Received copy of the within notice  
and copy of petition and bond for removal thereto



attached this 11th day of October, 1913.

THEO. A. BELL, J.,  
Attorney for Plaintiffs.

LAMY & PUTNAM,  
Of Counsel.

Filed October 15th, 1913. F. J. Rodrigues, Clerk.  
By T. A. Luttrell, Deputy Clerk.

Attached to above notice are copies of the petition  
for removal of cause to United States District Court,  
and bond for removal as hereinafter set forth, viz.:  
[26]

*In the Superior Court of the State of California, in  
and for the County of San Luis Obispo.*

No. 5454.

MARY MURRAY and LENA MURRAY, a Minor,  
by Her Guardian *ad Litem*, MARY MUR-  
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

PETITION FOR REMOVAL OF CAUSE TO  
UNITED STATES DISTRICT COURT.

To the Honorable, The Superior Court of the State  
of California, in and for the County of San  
Luis Obispo:

Your petitioner, Southern Pacific Company, re-  
spectfully shows:

## I.

That it is the defendant in the above-entitled suit or action. Said suit, as appears from the complaint therein, is of a civil nature at law brought by plaintiff to recover judgment against defendant, your petitioner, in the sum of Fifty Thousand Dollars (\$50,000), and costs of suit, which claim your petitioner wholly contests and denies, and alleges that the amount involved in said action, exclusive of interest and costs, exceeds the value of Three Thousand Dollars. [27]

## II.

That at the time of the commencement of said suit, said Southern Pacific Company, your petitioner, was, ever since has been and still is, a railroad corporation incorporated and existing under laws of the State of Kentucky and a citizen and resident of said State and a nonresident of the State of California. At the time of the commencement of said suit, plaintiffs Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, and Lena Murray were, ever since have been and now are citizens of the State of California and residents of the Northern District of said State.

## III.

At the time of the commencement of said suit, there was, ever since has been and still is, therein, a controversy wholly between citizens of different states which can be fully determined between them, that is to say, between plaintiffs, Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, and Southern Pacific Company, de-

fendant and petitioner herein.

IV.

Service of summons was made in said suit on your petitioner on the 16th day of September 1913, and not before said day, in the city and county of San Francisco, State of California, and your petitioner is not required by the laws of the State of California, or the rules of the above-named Superior Court in which said suit is brought, to answer or plead to the complaint of plaintiffs therein until the 16th day of October 1913.

V.

Your petitioner files and offers herewith its bond with good and sufficient surety for its entering in the District Court of the United States, Southern Division of Southern [28] District of California, within thirty days from the date of filing of said petition for removal of said cause, a certified copy of the record in said suit and for paying all costs that may be awarded by the said District Court if said court shall hold that said suit was wrongfully or improperly removed thereto.

WHEREFORE, your petitioner prays this Honorable Court to accept said bonds as good and sufficient and to make its order for the removal of said cause to the District Court of the United States for the Southern Division of the Southern District of California, pursuant to the Act of Congress in such cases made and provided, and such other and further order as may be proper, and to cause the record herein to be removed to said District Court and that

no other or further proceedings be had in said Superior Court.

SOUTHERN PACIFIC COMPANY.

[Corporate Seal]

By G. L. KING,

Assistant Secretary.

W. H. SPENCER,

Attorney for Petitioner. [29]

State of California,

City and County of San Francisco,—ss.

G. L. King, being duly sworn, deposes and says: That he is an officer, to wit, the assistant secretary of Southern Pacific Company, petitioner named herein; that he has read the foregoing petition and knows the contents thereof and that said petition is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

G. L. KING.

Subscribed and sworn to before me this 11th day of October, 1913.

[Notarial Seal]

E. B. RYAN,

Notary Public in and for the City and County of San Francisco, State of California. [30]

*In the Superior Court of the State of California, in  
and for the County of San Luis Obispo.*

No. 5454.

MARY MURRAY and LENA MURRAY, a minor,  
by Her Guardian *ad Litem*, MARY MUR-  
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

BOND FOR REMOVAL.

KNOW ALL MEN BY THESE PRESENTS:

That Southern Pacific Company, a corporation duly incorporated and existing under laws of the State of Kentucky, and a resident of said State, as principal, and United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, which said corporation has complied with the laws of the State of California with reference to doing and transacting business in said State of California, as surety, are held and firmly bound unto Mary Murray and Lena Murray, a minor by her guardian *ad litem*, Mary Murray, plaintiffs in the above-entitled action, in the penal sum of One Thousand Dollars (\$1,000), for payment whereof well and truly to be made unto said Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, their heirs, [31] executors, administrators or assigns, we bind ourselves,



our successors and assigns, jointly and severally firmly by these presents.

SEALED with our seals and dated in the city and county of San Francisco, State of California, this 11th day of October, 1913.

WHEREAS said Southern Pacific Company has petitioned, or is about to petition, the above-named Superior Court for the removal of the above-entitled cause or action therein pending, wherein said Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, are plaintiffs, and said Southern Pacific Company is defendant, to the District Court of the United States for the Southern Division of the Southern District of California;

NOW, the condition of this obligation is such that if the said defendant, Southern Pacific Company, shall enter in said District Court of the United States in and for the Southern Division of the Southern District of California, within thirty days from the date of filing said petition for removal of said cause, a certified copy of the record in the above-entitled suit or action and shall pay all costs that may be awarded by said District Court if said District Court shall hold that said suit was wrongfully or improperly removed thereto, and shall appear and enter special bail in said suit if special bail was originally requisite therein, then the above obligation shall be void, otherwise it shall remain in full force and effect.

WITNESS our hands and seals the day and year first above written. [32]

SOUTHERN PACIFIC COMPANY.

[Corporate Seal]

By G. L. KING,  
Assistant Secretary.

UNITED STATES FIDELITY AND  
GUARANTY COMPANY.

By H. V. D. JOHNS,  
Attorney in Fact.

[Corporate Seal]

W. S. ALEXANDER,  
Attorney in Fact.

State of California,

City and County of San Francisco,—ss.

On this 11th day of October, 1913, before me, E. B. Ryan, a notary public in and for the city and county of San Francisco, State of California, duly commissioned and sworn, personally appeared, G. L. King, known to me to be the assistant secretary of Southern Pacific Company, the corporation described in and that executed the foregoing bond, and acknowledged to me that said corporation executed said bond.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the city and county of San Francisco, State of California, the day and year in this certificate first above written.

[Notarial Seal]

E. B. RYAN,  
Notary Public in and for the City and County of San Francisco, State of California. [33]

State of California,  
City and County of San Francisco,—ss.

On this 11th day of October, 1913, before me personally appeared H. V. D. Johns and W. S. Alexander known to me to be the persons whose names are subscribed to the foregoing instrument as attorneys in fact for the United States Fidelity and Guaranty Company, and they acknowledged to me that they subscribed the name of the United States Fidelity and Guaranty Company thereto as principal, and their own names as attorneys in fact.

[Notarial Seal]                      W. W. HEALEY,  
Notary Public in and for the City and County of San  
Francisco, State of California. [34]

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*In the Superior Court of the State of California, in  
and for the County of San Luis Obispo.*

No. 5454.

MARY MURRAY and LENA MURRAY, a minor,  
by Her Guardian *ad Litem*, MARY MUR-  
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

**Order for Removal [of Cause to U. S. District  
Court].**

Upon reading and filing petition and bond of de-  
fendant, Southern Pacific Company, for removal of

the above-entitled action to the United States District Court for the Southern Division of Southern District of California, and it appearing to the Court that written notice of said petition and bond for removal was given by defendant to plaintiffs prior to filing said petition and bond, and this matter duly coming on for hearing, said bond is hereby approved and accepted as good and sufficient and it is hereby ORDERED that said cause be, and the same is, hereby removed to the District Court of the United States for the Southern Division of Southern District of California.

Dated this 15th day of October, 1913.

E. P. UNANGST,  
Judge.

[Endorsed]: Filed October 15th, 1913. F. J. Rodrigues, Clerk. By T. A. Luttrell, Deputy Clerk.  
[35]

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*In the Superior Court of the State of California, in  
and for the County of San Luis Obispo.*

No. 5454.

MARY MURRAY and LENA MURRAY, a minor,  
by Her Guardian *ad Litem*, MARY MURRAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
tion,

Defendant.

**Certificate of Clerk of State Court on Removal.**

I, F. J. Rodrigues, county clerk and ex-officio clerk of the Superior Court of the State of California, in and for the county of San Luis Obispo, hereby certify that I have compared the annexed and foregoing copies of complaint, demurrer, notice, petition and bond of defendant Southern Pacific Company for removal of cause to the United States District Court for the Southern Division of Southern District of California, and order for removal in the case of Mary Murray and Lena Murray, a minor, by her guardian ad litem, Mary Murray, plaintiffs, vs. Southern Pacific Company, defendant, and constituting the record in said cause, with the originals now on file in my office and that such annexed and foregoing copies are true and correct transcripts thereof, and of the whole of said originals.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 15th day of October, 1913.

[Seal]

F. J. RODRIGUES,  
Clerk. [36]

[Endorsed]: No. 5454. Superior Court, County of San Luis Obispo, State of California. Dept. No. ——. Mary Murray and Lena Murray, a minor, by her Guardian *ad litem*, Mary Murray, Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Certified Copy of Transcript of Record on Removal. W. H. Spencer, Attorney for Petitioner, San Luis Obispo, California.



[Endorsed]: No. 279—Civil. United States District Court, Southern District of California, Southern Division. Mary Murray. et al. vs. Southern Pacific Company. Certified Transcript of Record on Removal from Superior Court of San Luis Obispo County. Filed Oct. 22, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [37]

**[Order Substituting Counsel for Plaintiffs, Overruling Demurrer, etc.]**

At a stated term, to wit, the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the second day of February, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 279—CIVIL S. D.

MARY MURRAY et al.,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

This cause coming on this day to be heard on defendant's demurrer to plaintiffs' complaint; now, on motion of Milton K. Young, Esq., and pursuant to the stipulation of the parties hereto by their solicitors of record, on file herein, it is ordered that Milton K. Young, Esq., and Theodore A. Bell, Esq., be, and they are hereby substituted in the place and stead

of Theodore A. Bell, Esq., as counsel for plaintiffs; thereupon, on motion of L. N. Turrentine, Esq., on behalf of counsel for defendant, it is ordered that defendant's said demurrer to plaintiffs' complaint be, and the same hereby is overruled, and that defendant be, and it hereby is assigned to answer said complaint within ten (10) days.

[Endorsed]: No. 279—Civil. United States District Court, Southern District of California, Southern Division. Mary Murray et al., Plaintiffs, vs. Southern Pacific Company, Defendant. Copy Order Overruling Demurrer. Filed Nov. 30, 1914. Wm. M. Van Dyke, Clerk. By Leslie C. Colyer, Deputy.  
[38]

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*In the District Court of the United States of  
America in and for the Southern District of  
California, Southern Division.*

MARY MURRAY and LENA MURRAY, a Minor,  
by Her Guardian *ad Litem*, MARY MURRAY,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.

**Answer.**

Now comes the said defendant and for answer to the complaint on file herein:

I.

Defendant has no knowledge, information or belief sufficient to enable it to answer as to any or either of the allegations contained in paragraphs I

to II of said complaint and basing its answer on said ground, denies each and every of the allegations of said paragraphs I and II of said complaint, generally and specifically.

## II.

Defendant denies that at the times mentioned in said complaint or at any time, it was the rule, custom or practice of said defendant to discharge its passengers at said station of Santa Margarita, in the night-time or otherwise, upon the east side of its trains only, and defendant denies that at the time mentioned in said complaint or at any time, either as said train [39] was approaching said station or at all, the said Murray, either when seated in the smoking-car of said train, or at any time, was invited or directed by the said E. M. Mulville, or by any brakeman, agent, servant or employe of said train or elsewhere, either to follow said brakeman or any brakeman, to the front platform of any car or elsewhere, or at all, or to alight from the said train, whether as alleged in said complaint or otherwise or at all; and defendant denies that any invitation or direction whether as alleged in said complaint or otherwise or at all was given by said brakeman, or any agent, servant or employe of defendant to the said Murray, or that by reason of said invitation or direction, or otherwise or at all, the said Murray immediately or otherwise followed such brakeman, or any agent, servant or employe of said defendant to the platform mentioned in said complaint or elsewhere, and defendant denies that by reason of any invitation or direction mentioned in said complaint

or any invitation or direction whatsoever, the said brakeman lifted up or opened any trap-door, referred to in said complaint or otherwise, and defendant on the contrary alleges that said trap-door was opened by said brakeman at the request of said Murray, for his own convenience, and for the purpose of allowing him to alight from the steps thereof, when the said train should have come to a stop, and not otherwise; defendant denies that while said train was moving into said station or elsewhere at the rate of about twenty miles an hour, or while the same was moving at all, or at any rate, or at any time whatsoever, the said brakeman, or any agent, servant or employee of defendant directed the said Murray to descend said steps or to alight from said train or otherwise or at all, and on the contrary defendant [40] alleges that the said brakeman directed the said Murray not to descend said steps or to attempt to alight from said train until the same should have stopped and defendant denies that it was then a fact or that it was then or there well or at all known by or to said brakeman to be a fact, or by or to any agent, servant or employee of defendant to be a fact, that the said Murray was wholly or at all unfamiliar with said station or its grounds or approaches, or wholly or at all ignorant of any rule, custom or practice concerning discharging passengers, whether as alleged in said complaint or otherwise or at all, and defendant denies that the said Murray was unfamiliar with said station or its grounds and approaches, and alleges that the said Murray, by the exercise of any degree of care whatsoever, at and



immediately prior to the time of said accident, could have seen and known that the said train was still moving, and could have seen and known of the ground alongside said train and in the vicinity thereof, and in the place where he attempted to alight therefrom, and defendant denies as it has hereinabove denied that there was any rule, custom or practice whatsoever, of discharging passengers in the night-time or otherwise, only on the east side of said train at said station, and denies that there was any rule, custom or practice in reference to discharging passengers on such side of said train at all; and defendant has no knowledge, information or belief sufficient to enable it to answer as to whether the said Murray knew or did not know whether any lights were provided or maintained on the west side of said trains at said station or elsewhere, and basing its answer on said ground, denies the allegations of said complaint in respect thereto, and on said ground denies that the said Murray did not know that no lights were provided or maintained [41] on the west side of said trains at said way station or elsewhere; and defendant denies that there was not sufficient light either upon said train or at said station, nor in the vicinity thereof, to enable the said Murray to descend said steps with safety, or that all or any of said alleged matters and things were then or at any time or place well or at all known to said brakeman or any agent, servant or employee of defendant, either at the time mentioned in said complaint or at any time, and defendant on the contrary alleges that there was sufficient light both



within and without said train in the vicinity of the place of said accident, to have enabled the said Murray to descend the said steps with safety, if he had exercised any degree of care whatsoever in so doing; defendant further denies that said brakeman, or any agent, employee or servant of defendant directed the said Murray, either at the time mentioned in said complaint, or at any time whatsoever, to descend said steps or to get off said train; defendant denies that any such invitation or direction as mentioned in said complaint or any invitation or direction whatsoever, was given or made by said brakeman or any agent, servant or employee of defendant to said Murray, either at the time or in the manner mentioned in said complaint, or at any time or in any manner whatsoever, and denies that there was any conduct, act, or thing of said brakeman, or any agent, servant or employee of said defendant, upon which the said Murray relied or had any right to rely, either in getting on the steps of said train, or attempting to alight therefrom, or from which he believed or had any right to believe that he could descend said steps or alight from said train with safety, and defendant denies that said Murray proceeded to descend said steps, either by reason of any invitation or direction of said brakeman, or any agent, servant or employee of defendant, or in [42] reliance upon any conduct of said brakeman, or any agent, servant or employee of defendant, or in any belief therefrom, that he could descend said steps or alight from said train with safety; and denies that the said Murray proceeded to descend said steps

in the presence of said brakeman, or in the presence of any agent, servant or employee of defendant; and defendant denies that said brakeman or any agent, servant or employee of defendant had full or any knowledge of any dangerous position of the said Murray, or had caused the said Murray to be placed in any dangerous position, or with or without such knowledge, wholly or at all failed or omitted to warn or caution said Murray of any danger or peril whatsoever; and defendant denies that the said Murray, in so descending said steps or otherwise, whether as alleged in said complaint or otherwise or at all, lost his foothold thereon by reason of any insufficient light, by reason of the motion of said train, or thereby fell to the ground or elsewhere, or thereby sustained injuries, whether as alleged in said complaint or otherwise or at all; and defendant on the contrary alleges, that the said Murray, carelessly, negligently and recklessly attempted to descend said steps and to alight from the said train while the same was still in motion, and thereby and by reason of his own carelessness, negligence and recklessness and not otherwise, fell to the ground; defendant denies that the light in said vicinity was insufficient, and alleges on the contrary that the light was sufficient to have enabled the said Murray to have avoided said accident, by the exercise of any degree of care whatsoever; and defendant denies that the said accident, or the fall of the said Murray from said car, were caused or produced in any manner whatsoever, by the sufficiency [43] or insufficiency of any light at said place, or by the motion of

said train or otherwise than by the fault, carelessness and negligence of the said Murray himself.

### III.

Defendant denies that the said brakeman, or any agent, servant or employee of defendant negligently did any act or omitted anything, or negligently or otherwise or at all disregarded any duty owing to the said Murray, as a passenger upon said train, or otherwise or at all; and denies that the injuries of the said Murray or his death, whether as alleged in said complaint or otherwise, were not caused by neglect and fault upon the part of said deceased himself; and defendant denies that it, or any of its agents, servants or employees, whether as alleged in said complaint or otherwise or at all, were guilty of any act or acts, fault, carelessness or negligence whatsoever, resulting in or producing or contributing to the injury or death of said Murray; and denies that by any act or acts, fault, carelessness or negligence of defendant or any of its agents, servants or employees, said Murray was injured or killed or the said plaintiffs either of them damaged in the sum of \$50,000 or any sum whatsoever.

### IV.

Defendant denies that any invitation or direction was given to the said Murray, by any agent, servant or employee of defendant, to descend said steps or alight from said train, either while said train was moving at the rate of twenty miles an hour, or otherwise or at all, or at any time, and denies that said train was moving into said station at the rate of twenty miles an hour, and alleges that as the train

approached the said [44] station and before reaching the said station, the speed thereof was reduced, and that at the time the said Murray attempted to alight from said train, carelessly, recklessly and negligently as aforesaid, the said train was still moving, but at a rate of speed of less than ten miles an hour at said time. And defendant alleges that at said time the said Murray had gone onto the platform of said car and down upon the steps thereof, in violation of the rules and regulations of this defendant; that such rules and regulations were reasonable rules and regulations, duly promulgated by said defendant; that such rules and regulations were then and there in force, printed, and conspicuously posted on the inside of the passenger cars of defendant, and that the said Murray was injured by reason of his violation of such printed rules and regulations, and by reason of his violation of positive verbal instruction, and injunction given to him by the brakeman of said train.

AND FOR A FURTHER, SEPARATE AND DISTINCT DEFENSE, defendant alleges:

V.

That the said deceased, Murray, did not himself exercise ordinary care, caution or prudence for his own safety, and that his injuries and death, whether as alleged in said complaint or otherwise or at all, were directly and proximately contributed to and caused, by the fault, carelessness and negligence of the said Murray, deceased, and by his failure to exercise ordinary care, prudence and caution in the premises.



WHEREFORE, defendant prays judgment for its costs.

J. W. McKINLEY,  
FRANK KARR,  
R. C. GORTNER,  
Attorneys for Defendant. [45]

State of California,  
County of Los Angeles,—ss.

Frank Karr, being by me first duly sworn, deposes any says: That he is one of the attorneys for the defendant in the above-entitled action; that he has heard read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

That he makes this verification for the reason that none of the officers of the defendant corporation reside within the county of Los Angeles.

FRANK KARR.

Subscribed and sworn to before me this 6th day of February, 1914.

[Seal] NAT B. BROWNE,  
Notary Public in and for the County of Los Angeles,  
State of California.

[Endorsed]: No. 279—Civil. No ——. Department ——. Superior Court, Los Angeles County, State of California. Mary Murray et al., Plaintiff vs. Southern Pacific Company, a Corporation, Defendant. Substitute Answer. Approved as Copy of Original and to be Filed in Lieu Thereof. M. K.



Young, of Counsel for Pltff. J. W. McKinley, 432 Pacific Electric Building, Cor. Sixth and Main Sts., Los Angeles, California, Attorney for Defendant. Filed by Order of Court, Dec. 10, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [46]

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[Verdict.]

*In the District Court of the United States, in and for the Southern District of California, Southern Division.*

No. 279—CIVIL.

MARY MURRAY, and LENA MURRAY, a Minor,  
by Her Guardian *ad Litem*, MARY MURRAY,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.

We, the jury in the above-entitled action, find in favor of the plaintiffs in the sum of \$5,000.00.

Los Angeles, November 28th, 1914.

EDWARD D. SILENT,  
Foreman.

[Endorsed]: No. 279.—Civil. U. S. District Court, Southern District of California. Southern Division. Mary Murray et al. vs. Southern Pacific Co. Verdict. Filed Nov. 28, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [47]

## UNITED STATES OF AMERICA.

*District Court of the United States, Southern District of California, Southern Division.*

No. 279—CIVIL, S. D.

MARY MURRAY and LENA MURRAY, a Minor,  
by Her Guardian *ad Litem*, MARY MURRAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

**Judgment.**

This cause having come on regularly on Friday, the 27th of November, 1914, being a day in the July term, A. D. 1914, of the District Court of the United States for the Southern District of California, Southern Division, for trial before the Court and a jury of twelve (12) men duly impaneled; Milton K. Young, Esq., and Theodore A. Bell, Esq., appearing as counsel on behalf of plaintiffs; W. I. Gilbert, Esq., appearing as counsel on behalf of defendant; and the trial having been proceeded with on the 27th and 28th days of November, 1914, and witnesses having been duly sworn and examined on behalf of the respective parties; and documentary evidence having been introduced on behalf of plaintiffs; and the evidence having been closed; and the cause, after argument by counsel for the respective parties, and the instructions of the Court, having been submitted to the jury on the 28th

of November, 1914; and the jury thereafter, on said 28th of November, 1914, having rendered the following verdict: [48]

“In the District Court of the United States, in and for the Southern District of California, Southern Division, Mary Murray and Lena Murray, a Minor, by her Guardian *ad Litem*, Mary Murray, Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. No. 279—Civil. We, the jury in the above-entitled action, find in favor of the plaintiffs in the sum of \$5,000. Los Angeles, November 28th, 1914. Edward D. Silent, Foreman.” And the Court having ordered that judgment be entered in accordance with said verdict in favor of the plaintiffs and against the defendant for the sum of Five Thousand (\$5,000) Dollars;

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, plaintiffs herein, do have and recover of and from the Southern Pacific Company, a corporation, defendant herein, the sum of Five Thousand (\$5,000) Dollars, together with their, said plaintiffs' costs herein, taxed at \$65.40.

Judgment entered November 30, 1914.

WM. M. VAN DYKE,

Clerk.

By Chas. N. Williams,

Deputy Clerk.

[Endorsed]: No. 279—Civil. United States District Court, Southern District of California, South-

ern Division. Mary Murray and Lena, Murray, a Minor, by Her Guardian *ad Litem*, Mary Murray, vs. Southern Pacific Company, a Corporation. Copy of Judgment. Filed Nov. 30, 1914. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. [49]

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**[Certificate of Clerk U. S. District Court to  
Judgment-roll.]**

*In the District Court of the United States, in and  
for the Southern District of California, South-  
ern Division.*

No. 279—CIVIL.

MARY MURRAY and LENA MURRAY, a Minor,  
by Her Guardian *ad Litem*, MARY MUR-  
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of the judgment made and entered in the above-entitled action, and recorder in Judgment Register No. 2 of said court for the Southern Division, at page 270 thereof; and I do further certify that the foregoing papers hereto annexed, constitute the judgment-roll in said action.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 30th day of November, A. D. 1914.

W. M. VAN DYKE,

Clerk.

[Seal]

By Leslie S. Colyer,

Deputy Clerk.

[Endorsed] : No. 279—Civil. In the District Court of the United States for the Southern District of California, Southern Division. Mary Murray et al. vs. Southern Pacific Company. Judgment-roll. Filed Nov. 30, 1914. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Recorded Judg. Register Book No. 2, page 270. [50]

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*In the District Court of the United States in and for the Southern District of California, Southern Division.*

No. 279—CIVIL. Dept. 2.

MARY MURRAY and LENA MURRAY, a Minor,  
by Her Guardian *ad Litem*, MARY MURRAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
tion,

Defendant.



**Notice of Motion for New Trial.**

To Mary Murray and Lena Murray, a Minor, by Her  
Guardian *ad Litem* Mary Murray, Plaintiffs;  
and to Messrs. Theodore A. Bell and Milton K.  
Young, Their Attorneys:

YOU WILL PLEASE TAKE NOTICE that the defendant will move the Court to vacate and set aside the verdict of the jury herein rendered on November 27, 1914, and the judgment entered thereon in favor of plaintiffs and against defendant, and to grant a new trial in the said action, for the following reasons and upon the following grounds, to wit:

1. That the evidence is insufficient to justify the verdict;
2. That the verdict is against law; and,
3. For errors in law occurring at the trial, and excepted to by the defendant.

Said motion will be made upon the minutes of the Court, including the notes of the evidence taken by the Judge who tried the case, as well as upon all the evidence received in the case [51] and transcribed by the reporter, including all the rulings and instructions of the Court, made and given on the trial and excepted to by the defendant, and also upon all the pleadings, proceedings, records, and papers on file in the said cause.

And defendant now specifies the following particulars in which the evidence was insufficient to justify the verdict of the jury, to wit:

1. The evidence is insufficient to justify the verdict of the jury in finding that the defendant was

guilty of any negligence which was the proximate cause of the injury and death of plaintiffs' intestate;

2. The evidence is insufficient to justify the verdict of the jury in finding that the deceased was free from contributory negligence which was the proximate cause of the injury, and such contributory negligence as in law bars a recovery by plaintiffs;

3. The evidence is insufficient to establish any grounds of invitation to alight on the wrong, or any, side of the train, or before the train had reached the station of Santa Margarita, or to establish that the deceased did not voluntarily assume the risk, barring recovery.

4. The evidence is insufficient to establish that the deceased was misled by, or acted upon, any words or acts of the brakeman, Mulville, in pointing out to the deceased where the hotel was situated, or by the statement: "Here is where you fellows get off" by reason of which the deceased was led to believe that he could alight with safety from the moving train at the point where he attempted to alight. [52]

5. The evidence is insufficient to establish any basis for the conclusion that said brakeman invited or directed, or that the deceased so understood the remarks of said brakeman as an invitation or direction, to alight on the wrong side of the train, or that the deceased acted or relied upon such remarks when he attempted to alight on the side opposite from the station and sustained the injuries herein complained of.

6. The evidence is insufficient to justify the verdict of the jury in finding that the remarks of Brake-

man Mulville were made, or understood by the deceased to be made, in the course, or within the scope, of his employment, or that the opening of the trap-door on the side of the train opposite the station was understood by plaintiff's intestate as an invitation to him to use the steps leading therefrom in alighting from said train, and

7. The evidence is insufficient to justify the verdict of the jury in finding that plaintiff's intestate did not know and realize the speed at which the train was moving at the time he attempted to alight from said train and that it was hazardous for him to attempt to alight therefrom. [53]

And defendant now specifies the following errors of law occurring at the trial and properly excepted to by the defendant, to wit:

1. The Court erred in denying defendant's motion for a nonsuit at the close of plaintiff's testimony, which motion is in words and figures as follows, to wit:

“COMES NOW THE DEFENDANT, Southern Pacific Company, and moves the Court for a nonsuit for the reason that the testimony offered is insufficient in law to establish a cause of action in favor of the plaintiff and against the defendant company; for the reason that the testimony in the case fails to develop any act of negligence on the part of the company from which the accident complained of resulted; for the reason that if negligence on the part of the company has been shown as a matter of law in the opening of the platform door, the deceased himself contributed to the injury by attempting to alight

from the train while it was in motion and moving, as shown by the plaintiff's testimony, at about the rate of ten or twelve miles an hour; and for the reason that the plaintiff having seen fit to attempt to alight from a train on the nonplatform side and while the train was in motion assumed the risks and dangers which were incidental thereto."

2. The Court erred in permitting the witness, Edward Mulville, to answer the following question, propounded by counsel for plaintiffs:

"Were you not violating Rule No. 837 when you opened those vestibule doors before the train came to a standstill, and which question was duly objected to by counsel for the defendant. [54]

3. The Court erred in permitting the witness, A. B. Spear, over the objection of defendant, to answer the following question propounded to him by counsel for plaintiffs:

"Q. I asked you if you didn't testify as follows, and if that doesn't correctly state the fact: 'Would you understand *the* when Mr. Mulville opened this door, the vestibule door on the side of the train opposite from the depot to permit this passenger to alight on that side, that he was violating a rule of the company?

" 'A. Well, if the passenger was not to alight until the train had come to a stop, I think it would be perfectly safe.' "

4. The Court erred in refusing to give, at the request of counsel for defendant, the following peremptory instruction to the jury to return a verdict in favor of defendant, which requested instruction



(formal parts omitted) is in words and figures as follows, to wit:

“COMES NOW THE DEFENDANT, Southern Pacific Company, a corporation, in the above-entitled and numbered cause, and moves the Court to direct the jury to return a verdict in favor of the defendant, for the reason that the testimony is insufficient in law to establish a cause of action in favor of plaintiff and against defendant company.”

5. The Court erred in refusing to give the following instructions to the jury, at the request of counsel for defendant, and the refusal to give each of said instructions is here assigned as error, said instructions being in words and figures as follows, to wit:

“You are instructed that the ordinary care required of the defendant is that care which ordinary prudent railroads, their officers and employees engaged in the same kind of business commonly used under similar circumstances. In the absence [55] of proof to the contrary, the legal presumption is that the defendant faithfully discharged its duty. If you believe from the evidence that the defendant exercised this ordinary degree of care, you have no right to establish in your minds, and to require of the defendant, a higher standard of care and to find against the defendant because the care it used did not reach your own high and speculative standard.

## II.

“In this case, the defendant presents two defenses by its answer: FIRST. That it was not guilty of negligence, and SECOND. That the deceased was guilty of contributory negligence. If from the evi-



dence you find that the accident happened without any fault or carelessness on the part of defendant amounting to want of ordinary care, then regardless of all other questions, your verdict must be for defendant. Should you find from the evidence that defendant was negligent, and that its negligence contributed to said injury, and that the deceased was also negligent and that his negligence contributed proximately to said injury, then your verdict must be for defendant.

### III.

“The test of defendant’s liability is that defendant is not to be held responsible for a consequence which is merely possible according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience. The defendant is bound to anticipate and provide against what usually happens, and what is likely to happen, but is never required to anticipate and provide against what is unusual and unlikely to happen, or what is only remotely and slightly probable. While a high degree of care and caution might, and perhaps would, guard against injurious consequences which are merely possible, yet the defendant is not required [56] to exercise such high degree of care; nor was it negligence on its part to omit such high degree of care, but the defendant is liable only for want of ordinary care for such injurious consequences as are usual and probable, or likely to happen and which ordinary care could have provided against.

### IV.

“You are instructed, gentlemen of the jury, that

to entitle the plaintiff to recover in this action, it must appear from the evidence that the injury sustained by the deceased was occasioned by the carelessness or negligence on the part of defendant or its servants or employees as charged in the complaint; and if you believe from the evidence that the deceased was injured in consequence of his voluntary alighting from the car of defendant, at the time of the accident, when it was in motion, then your verdict should be for defendant.

#### V.

“You are instructed that if you should find from the evidence, that the deceased had an opportunity to remain in the car until the train had come to a stop, and that he voluntarily and negligently abandoned his position in said train, and voluntarily and negligently took a position on the platform steps of the car, and maintained such position until the time of the injury, and if you should believe from the evidence that the plaintiff, before the accident, could have, by the exercise of ordinary care, remained standing inside of the car, and that he would have been safer there, then the plaintiff cannot recover, and you should find for the defendant.

#### VI.

“You are further instructed that the brakeman, or other servants of the defendant company, had a right to assume that the deceased would not attempt to alight before the train was stopped, and would not be guilty of negligence in failing [57] to warn him not to get off as he descended the steps.”

VII.

“In your deliberations, gentlemen of the jury, it is your duty not to allow yourselves to be swayed by passion, prejudice, or sympathy. The defendant company is entitled to the same fair and impartial treatment and consideration as if it were a private person, and you must not allow yourselves to be swayed in determining the merits of this case by any sympathy which you may have for plaintiff by reason of any damage which she may have suffered, if any, or by reason of her youth, or poverty, if such there be, or by reason of any belief that you may entertain as to the wealth or influence of the defendant, or by reason of the fact that it is a corporation and not a private person.

VIII.

“You are instructed, gentlemen of the jury, that the calling of a station by the brakeman, and the opening of a door of the car, is an invitation to the passenger to prepare to alight, but only after the train has stopped, and where a passenger is not thrown from a car by the negligent operation of the train, but he voluntarily attempts to alight before the train stops, and is killed, the carrier is not liable.”

6. The Court erred in giving, at the request of plaintiffs, the following instructions to the jury, and the giving of each of said instructions is here specified separately as error on the part of the Court, said instructions being originally numbered and reading as follows, to wit:

I.

“You are instructed that a railroad company is re-

quired to exercise the highest degree of care to secure the safety of its passengers, and is liable for the slightest negligence, if an [58] injury is caused thereby, and a carrier's duty is not ended by carrying a passenger safely from one point to another, but said carrier must set the passenger down safely at his destination, if in the exercise of the utmost care it can be done.

#### XI.

“In determining whether or not the defendant corporation exercised the greatest degree of care toward the deceased, Henry Murray, the jury should consider any and all directions or instructions which the jury may find were given to him by the brakeman on the train, and also all the acts and conduct of the brakeman in opening the vestibule doors and trap-door on the opposite side of the train from the station at Santa Margarita.

#### XIV.

“In determining whether or not the deceased, acting as a reasonable and prudent man was induced to believe by any words or acts upon the part of the brakeman, that the train was at a standstill, you are to consider Murray's familiarity or unfamiliarity with the location, the question of darkness, the sufficiency or insufficiency of lights, and any and all other conditions or circumstances surrounding his attempt to alight from the train.

#### XV.

“I instruct you that a passenger on a railroad train has a right to rely upon the instructions or directions given him in the form of words or actions on the part



of a brakeman, unless under the circumstances a reasonable and prudent man would not rely thereon."

7. The Court erred in giving, without being requested by either party, the following instructions to the jury, and the giving of each of said instructions is here specified separately as error on the part of the Court, said instructions being [59] numbered and reading as follows, to wit:

III.

"The Court instructs the jury that the degree of care required of a passenger is not the highest of care, but the ordinary care which ordinary prudent people are accustomed to exercise.

V.

"With the respect to the alleged negligence of the defendant relied upon by plaintiffs herein, I instruct you that the burden is on the plaintiffs to show the existence of such negligence by a preponderance of the evidence; With respect to the alleged contributory negligence of the deceased, Henry Murray, I charge you that the burden is on the defendant to show the existence of such contributory negligence, by a preponderance of the evidence.

"The first question for you to determine in this case is: was defendant, through its servants or agents, guilty of negligence as alleged by plaintiffs in their complaint: If you find and believe that defendant was not guilty of negligence as alleged in said complaint, your verdict will be for the defendant: If, however, you find and believe, from a preponderance of the evidence, that the defendant was



guilty of negligence as alleged in the complaint, then you will consider whether such negligence, so found by you, proximately caused the accident and injuries suffered by said Henry Murray: if you should find and believe that such negligence did not proximately cause the accident and injuries suffered by said Murray, then your verdict will be for the defendant: if, however, you should find and believe, from a preponderance of the evidence that such accident and injuries were proximately caused by the negligence of the defendant's agent, as alleged in the complaint, then you will determine whether or not said Henry Murray, as alleged in defendant's [60] answer, was guilty of contributory negligence i. e., negligence upon his part which contributed proximately to the accident and injuries suffered by him; if you find from a preponderance of the evidence that said Murray was guilty of negligence and that such negligence contributed proximately to the accident and injuries suffered by him, then you will find for the defendant; if, however, you do not find that said deceased was guilty of negligence as alleged in the answer, or if you do not find that any negligence committed by said deceased proximately contributed to the accident and injuries suffered by him, then your verdict will be for the plaintiffs.

“If, pursuant to the foregoing instructions you should find the verdict in favor of the plaintiffs, you will award them such damages as you find that they have suffered by reason of the death of said Henry Murray, not exceeding the amount prayed for in the complaint, to wit, fifty thousand dollars.

8. The Court erred in modifying the following instructions, requested by defendant to be given, for the reason that the modified instructions given by the Court did not properly present the law involved in said requested instructions:

II.

“You are instructed that the burden of proving the issue of negligence charged against the defendant rests upon the plaintiff, and that she has the affirmative of such issue, and that unless she proves such negligence by a preponderance of the whole evidence in this case, plaintiff can not recover; and that where the evidence is equally *balance*, or where you are unable to find from all the evidence that the preponderance is in favor of plaintiff, then your verdict must be for the defendant.

IV.

“You can not presume negligence on the part of the defendant [61] company from the mere fact of the death by accident of the deceased, but it is the duty of plaintiff to satisfy your minds by a preponderance of the evidence not only that defendant was guilty of negligence, but also that the negligence of defendant was the proximate cause of such death, and it is not sufficient for plaintiff’s case if the evidence offered upon this subject leaves the question of defendant’s negligence uncertain and in doubt, for you have no right to merely guess or conjecture from doubtful evidence among many nearly possible chances or causes that some act or omission of defendant might possibly render it responsible, if there is no satisfactory foundation in the evidence for such

guess or conjectural conclusion. It is the duty of the plaintiff to show by a preponderance of the evidence that defendant's negligence in fact contributed proximately to the accident and death of the deceased.

## VI.

“If the accident causing the death of the deceased was such that it could not in the exercise of the respective degrees of care required by law have been foreseen either by the plaintiff or defendant, and occurred without negligence on the part of either, then your verdict must be for defendant.

## X.

“You are further instructed that even should you find from the testimony that the acts and conduct of the brakeman of defendant amounted to an invitation or request to the deceased to alight, or that the train had stopped, the deceased would not thereby be absolved from the duty to use due care for his own protection, and if you should find that after such acts and conduct, the deceased repaired to the platform while the train was moving, and could have, by the exercise of ordinary care, [62] observed that the train was in motion, and without taking the necessary precaution to ascertain the speed at which the train was moving, stepped off and thereby received the injury complained of, he can not recover.

## XI.

“It is admitted by the plaintiff in this case, gentlemen of the jury, and alleged in the complaint, that the defendant, the Southern Pacific Company, at the

time of the accident had furnished a platform where sufficient lights were provided and maintained by the defendant for the convenience and safety of the passengers alighting from said train, but that no lights of any kind or character were provided or maintained by said defendant at said station on the west side of said train; therefore you are instructed that the railway company, having provided a safe place for the convenience and safety of its passengers to alight, in the absence of any conduct on the part of defendant's brakeman, inducing in the deceased the belief that he could safely alight on the opposite side, it was the duty of the deceased, after having notice of the approach of the train, and if he voluntarily selected the opposite side, or the non-platform side, of the train, for alighting, and attempted to alight from said car while in motion, thereby receiving the injuries from which he dies, you should find for the defendant."

The above-named plaintiffs and their attorneys of record WILL FURTHER TAKE NOTICE that the defendant will bring said motion for a new trial, as hereinafter noticed, on for hearing before the above-entitled court, in the courtroom of department two, [63] in the Federal Building, in the city of Los Angeles, county of Los Angeles, State of California, on Monday, January 11, 1915, at the hour of ten-thirty in the forenoon of that day.

Dated this fourth day of January, 1915.

HENRY T. GAGE,  
W. I. FOLEY and  
W. I. GILBERT,  
Attorneys for Defendant.



[Endorsed]: Original. No. 279—Civil. United States District Court, Southern District of California, Southern Division. Mary Murray et al., Plaintiffs, v. Southern Pacific Company, a Corporation, Defendant. Notice of Motion for New Trial. Received copy of the within notice this — day of Janyart, '15. Theodore A. Bell and M. K. Young, Attorneys for Plaintiff. Henry T. Gage, W. I. Foley and W. I. Gilbert, Attorneys for Defendant. Filed Jan. 6, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [64]

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**[Order Vacating and Setting Aside Judgment and Verdict and Granting Motion for a New Trial.]**

At a stated term, to wit, the January Term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the twenty-fourth day of May in the year of our Lord one thousand nine hundred and fifteen. Present: the Honorable BENJAMIN F. BLEDSOE, District Judge.

No. 279—CIVIL S. D.

MARY MURRAY, et al.,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant,

This cause having heretofore been submitted to the Court for its consideration and decision, on de-



fendant's motion for a new trial; the Court, having duly considered the same and being fully advised in the premises, now hands down its opinion, and it is by the Court ordered that the judgment heretofore entered herein be, and the same hereby is vacated and set aside, and it is further ordered that the verdict of the jury in this cause be, and the same hereby is set aside, and it is further ordered that defendant's motion for a new trial of this cause be and the same hereby is granted.

[Endorsed]: No. 279—Civil. United States District Court, Southern District of California, Southern Division. Mary Murray et al., Plaintiffs, vs. Southern Pacific Company, Defendant. Copy Minute Order Granting Motion for New Trial. Filed Sep. 11, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [65]

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*In the District Court of the United States of America, in and for the Southern District of California, Southern Division.*

#279.

MARY MURRAY, and LENA MURRAY, a Minor,  
by Her Guardian *ad Litem*, MARY MURRAY,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendants,

**Stipulation [as to Testimony and Evidence on New Trial, Motion for a Nonsuit, etc.].**

WHEREAS a trial of the above-entitled action

was had in the above-entitled court on the 27th and 28th days of November, 1914, the Court sitting with a jury, and a verdict and judgment was therein rendered and entered, in favor of the plaintiffs, and against the defendant, in the sum of five thousand dollars; and

WHEREAS thereafter, upon motion of the defendant for a new trial in said cause, the said verdict and judgment was by the Court vacated and set aside; and

WHEREAS said cause had been set for trial in said Court on the 7th day of September, 1915, at the hour of ten o'clock in the forenoon; and

WHEREAS it is deemed convenient by the parties hereto to submit said cause to said Court, sitting without a jury, upon all of the testimony and evidence taken and heard therein upon the said previous trial in said court, for the purpose, among other things, of permitting the defendant to move for a nonsuit therein upon any grounds which may be designated in said motion;

Now, therefore, it is hereby stipulated by the parties hereto that at the time said cause is called for trial on September [66] 7th, 1915, at the hour of ten o'clock in the forenoon of that day, or at such time as the trial thereof may be continued by order of the Court or agreement of counsel herein, all of the testimony and evidence given and received upon the previous trial of said cause may be submitted to the Court, sitting without a jury, as fully and with like force and effect as though said testimony and evidence were actually given, admitted and heard

upon a trial of said cause; that upon the submission of said testimony and evidence the defendant shall move for a nonsuit and dismissal of said action, upon such grounds as the defendant may specify in said motion; and thereupon said motion for a nonsuit shall be heard and determined by the Court; provided, however, that nothing herein contained shall be so construed as to prevent or affect the right of either or any of the parties hereto to move for a new trial or to appeal from any order which may be made and entered upon the hearing and determination of said motion of nonsuit; and said order shall be deemed to be excepted to.

Dated August 26, 1915.

THEODORE A. BELL,  
MILTON K. YOUNG,  
Attorneys for Plaintiffs.  
HENRY T. GAGE and  
W. I. GILBERT,  
Attorneys for Defendant.

[Endorsed]: No. 279—Civil. In the District Court of the United States, in and for the Southern District of California. Mary Murray, et al., Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Stipulation. Filed Sep. 7, 1915. Wm. M. Van Dyke, Clerk. T. F. Green, Deputy. [67]

*In the District Court of the United States in and for  
the Southern District of California, Southern  
Division.*

No. 279—CIVIL — Dept. 2.

MARY MURRAY and LENA MURRAY, a Minor,  
by Her Guardian *ad Litem*, MARY MUR-  
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.

**Defendant's Motion for Nonsuit.**

Now comes the defendant, Southern Pacific Company, and moves the Court for a nonsuit; First, for the reason that the testimony offered is insufficient in law to establish a cause of action in favor of the plaintiffs and against the defendant company; second, for the further reason that the testimony offered fails to develop any act of negligence on the part of the defendant company for which the accident complained of resulted; third, for the reason that if negligence on the part of the defendant company has been shown as matter of law or fact in the opening of the door, then the deceased himself contributed to the injury by attempting to alight from the train while it was moving, as shown by the plaintiffs' testimony, at the rate of ten or twelve miles an hour; and, fourth, for the further reason that the deceased having seen fit to alight from the train on the nonplatform side, while the train was

in motion assumed the risks which were incidental to his attempt to alight.

HENRY T. GAGE and  
W. I. GILBERT,  
Attorneys for Defendant.

[Endorsed]: Original. No. 279—Civil. In the United States District Court, Southern District of California, Southern Division. Mary Murray, et al., Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Defendant's Motion for Nonsuit. Filed Sep. 7, 1915. Wm. M. Van Dyke, Clerk. T. F. Green, Deputy. Henry T. Gage and W. I. Gilbert, 1208-10 Merchants Natl. Bank Bldg. Sixth and Spring Streets, Los Angeles, Cal. Attorneys for Defendant. [68]

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**[Order Granting Motion for a Nonsuit, etc.]**

At a stated term, to wit, the July term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Tuesday, the seventh day of September, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. 279—CIVIL, S. D.

MARY MURRAY, et al.,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.



This cause coming on this day to be heard by consent on defendant's motion for a nonsuit; Milton K. Young, Esq., appearing as counsel for plaintiffs; W. I. Gilbert, Esq., appearing as counsel for defendant; and counsel for plaintiffs having offered all the evidence given and admitted on the former trial of this cause and having rested; and said motion for a nonsuit having thereupon been argued, in support thereof, by W. I. Gilbert, Esq., of counsel for defendant, and in opposition thereto by Milton K. Young, Esq., of counsel for plaintiffs; and this cause having been submitted to the Court for its consideration and decision on defendant's said motion for a nonsuit and the argument thereof, it is now by the Court ordered that defendant's motion for a nonsuit in the cause be, and the same hereby is granted; and it having been stipulated that the transcript of evidence and proceedings on the former trial may be taken as [69] the record herein; thereupon, on motion of Milton K. Young, Esq., of counsel for plaintiffs, and by consent of W. I. Gilbert, Esq., of counsel for defendant, it is ordered that plaintiffs herein may have sixty days from this date within which to present a motion for a new trial and the record of the evidence.

[Endorsed]: No. 279—Civil. United States District Court, Southern District of California, Southern Division. Mary Murray et al., Plaintiffs, vs. Southern Pacific Company, Defendant. Copy Minute Order Granting Motion for Nonsuit. Filed Sep. 11, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [70]

UNITED STATES OF AMERICA.

*District Court of the United States, Southern District of California, Southern Division.*

No. 279—CIV.

MARY MURRAY and LENA MURRAY, a Minor,  
by MARY MURRAY, Her Guardian *ad Litem*,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.

**Judgment [on New Trial].**

This cause coming on regularly on Tuesday, the 7th day of September, 1915, being a day in the July term, A. D., 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, to be tried before the Court and a jury to be impanelled; Milton K. Young, Esq., appearing as counsel for the plaintiffs; W. I. Gilbert, Esq., appearing as counsel for the defendant; and counsel for the respective parties hereto having stipulated in open court that the testimony taken at the former trial of this cause may be considered as the testimony upon this trial; and defendant having thereupon filed a motion for nonsuit; and the Court, after hearing argument of respective counsel on said motion for nonsuit, having ordered that said motion be granted;

NOW, THEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is considered by the court that Mary [71] Murray and Lena Murray, by Mary Murray, her Guardian *ad Litem*,

Plaintiffs herein, take nothing by this, their action, and that the Southern Pacific Company, Defendant herein, go hereof without day, and that said defendant do have and recover of and from said plaintiffs its, said defendant's costs herein, taxed at \$——.

JUDGMENT ENTERED SEPTEMBER 11, 1915.

WM. M. VAN DYKE,  
Clerk.

By T. F. Green,  
Deputy Clerk.

[Endorsed]: No. 279—Civil. United States District Court, Southern District of California, Southern Division. Mary Murray et al., Plaintiffs, vs. The Southern Pacific Company, Defendant. Copy of Judgment. Filed Sep. 11, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [72]

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**[Certificate of Clerk U. S. District Court to Judgment-roll (on New Trial).]**

*In the District Court of the United States, in and for the Southern District of California, Southern Division.*

No. 279—CIVIL.

MARY MURRAY and LENA MURRAY, a Minor  
by MARY MURRAY, her Guardian *ad Li-*  
*tem,*

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

I, Wm. Van Dyke, clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of the judgment made and entered in said action, and recorded in Judgment-book No. 2 thereof, for the Southern Division, at Page 314 thereof; and I do further certify that the papers hereto annexed constitute the judgment-roll in said action.

Attest my hand and the seal of said District Court, this 11th day of September, A. D. 1915.

[Seal]

WM. M. VAN DYKE,

Clerk.

By Leslie S. Colyer,

Deputy Clerk. [73]

Endorsed]: No. 279—Civil. In the District Court of the United States for the Southern District of California, Southern Division. Mary Murray, et al., etc., Plaintiffs, vs. Southern Pacific Co., a corporation. Judgment-roll. Filed Sept. 11, 1915. Wm. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Recorded Judg. Register Book No. 2 page 314. [74]

*In the District Court of the United States of America, in and for the Southern District of California, Southern Division.*

MARY MURRAY, and LENA MURRAY, a Minor,  
by her guardian *ad Litem*, MARY MURRAY,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.

### **Bill of Exceptions.**

This cause came on regularly for trial before the Court on the 7th day of September, 1915, Theodore A. Bell and Milton K. Young appearing as attorneys for the plaintiffs, and Henry T. Gage and W. I. Gilbert appearing as attorneys for the defendant. In pursuance of the stipulation entered into between the parties, hereinafter set forth, the plaintiffs introduced all the testimony and evidence given at the former trial of said cause, before the Court and Jury, on the 27th and 28th days of November, 1914, and the plaintiffs thereupon submitted said cause upon said testimony and evidence so introduced. Whereupon the defendant presented its motion for nonsuit hereinafter set forth at the end of the testimony, which motion the Court granted, and ordered a judgment of nonsuit, to which order and judgment the plaintiffs duly excepted. The testimony submitted to the court upon which said motion for nonsuit was granted is as follows, to wit: [75]



**[Testimony of William Thomas Moran, for  
Plaintiff.]**

Direct Examination

(By MR. BELL.)

My name is William Thomas Moran, age 37, residence San Francisco, occupation police officer in service nearly ten years. Am now on the Board of Identification of the police department. Was acquainted with Henry Murray, he is now dead, Have known him about four years; we were good friends; knew his wife and daughter. Left with Murray on evening of May 30, 1913, going to Santa Margarita, arriving there about eleven o'clock at night. We were seated near the front of the smoking-car on the left-hand side. When the brakeman went through, Murray said: "I think I know that fellow, and I know his father." Quite a long while after that, Murray got up and spoke to the brakeman, and when he came back he told me that that was the fellow, that he knew his father well. Afterwards as the brakeman came into the car, they talked together. I noticed the brakeman was usually getting off at each station at that end of the smoker, and he spoke to him therefore some time, and Murray told him his business down there, where we were going—that we were going down to see some land, and he had sent a wagon and some stuff down there to a man in the Santa Margarita Hotel, and I don't know just exactly what started the conversation in regard to that, but neither of us had been down there before, and I believe Murray asked

(Testimony of William Thomas Moran.)

him if he knew where the Santa Margarita Hotel was, and I am not positive whether he asked him or not, but I was not paying much attention to the conversation until Mulville says: "The Santa Margarita Hotel is on the opposite side of the station. That station is on the left side and the [76] Santa Margarita Hotel is on the right-hand side, and when we get there I will show you where to get off." So that was about all of the conversation I paid attention to there, for that was all I was interested in. They talked about men known to both. I did not pay much attention to that; I was reading the papers, and one thing or another. As we came into Santa Margarita, of course, we knew it was the station Santa Margarita. The whistle blew, and very soon afterwards Mulville came in from the rear of the smoker and came down and called and beckoned to us and says: "This is where you fellows get off." We went back to the rear end of the smoker, and Murray was first and I followed him, the brakeman was ahead of Murray. He opened up the gate, the trap, and the door, on the forward end of the coach immediately behind the smoker, or at the rear end of the smoking-car, as we have reference to, and he pointed out and said, "There is your hotel up there," and he left at once and went to the front end of the smoking-car. Murray started down the steps, and the train was slowing down, and in fact it was just gliding along, and I was going down after him, but I knew that he was very close to the bottom—must have been on the last step, and

(Testimony of William Thomas Moran.)

I happened to glance up and saw the light from the car windows out on the ground, and I saw we were going quite fast, a great deal faster than I ever thought we were going, and Murray at the same time made an effort to step or get off or something and I called to him and it was too late, he was over-balanced, and he went off. He had a grip in his left hand, and had hold of the hand-hold on the right-hand side. He went to go off, and as I called to him of course his grip came down and he would let it rest on the step and then pick it up, and he raised his foot to go off and [77] he started straight back and the grip swung out and his left hand swung around and he just went as quick as that (snapping fingers); he was gone. His back was toward the engine when he fell. When the brakeman pointed out to him and said "There is your hotel," I was immediately back of Murray. We were all pretty well crowded on the platform there. The brakeman was down the steps a ways, and he had to stoop down to point to it, when we were coming in to it. We hadn't got abreast of it, I saw lights, but I couldn't distinguish to which one he was pointing to. It was dark, you couldn't see a thing there. It was very dark, excepting where the lights of the train—where I was the light shone there from the smoker I came out of, and also the lights from the coach behind was showing through, and there was a porter or somebody standing just inside the door of that coach, and that door was open. It was too dark to see the ground im-

(Testimony of William Thomas Moran.)

mediately below the step. The only reason why I knew that Murray was making a mistake was because I got a glimpse of the ground from the lights of the car windows down below, the way it would shine out below.

Q. And by that means you knew the train was still moving?

A. Oh, yes, I saw then it was going much faster than—over on the street there were lights, but the street is a considerable distance from the car tracks. I believe they are coal-oil or gas-lights. They were very dim; they did not flash on the ground; there was no light immediately in front of the steps when he stepped off—absolutely. The brakeman pulled up the trap-door first and swung that back, then he opened the door, the outside door of the car, he was in a hurry at the time. He immediately left. After I saw Murray disappear, I went down the steps and got off and ran back along until I found him. I called to him several times, but I found him lying alongside of the track. [78] He was unconscious. I went across the lots and brought a doctor, and when I got back the doctor was there and someone else, and we took Murray—the doctor was there and he examined him and he had an awful hole in the back of his head. We put him on the stretcher and put him in the observation car and brought him to San Luis Obispo. There was an ambulance waiting for us there, and we took him to a sanitarium there. He lived about three hours. When we got to the sanitarium, I went to the station and telegraphed, and then went



(Testimony of William Thomas Moran.)

back again. He did not recover consciousness. At the time Murray got off the trap-doors and vestibule doors on the right-hand side of the train were closed. I do not know if they were opened at all. The train had not come to a standstill when I got off. Up to that time the doors on the station side between the smoker and first coach had not been opened, to my knowledge. They were not opened at the time Murray started to descend. Murray was a large man, five feet eleven inches high, and weighed about 230 pounds, a great big, strapping man—I have a picture of him here that I took the summer before. (Picture marked Plaintiff's Exhibit 1.) He told me he was 38. His health was first-class. I saw him several times daily. He was a great, big, husky, jovial fellow, a fine-looking man. He employed two men in his business—grocery and saloon. The bar room was on California Avenue and the grocery on Powell Avenue. It was a thickly settled community in the Mission district. I always believed he had a good business. We occupied no other car during the trip but the smoking-car. It was Memorial Day and we had excursion rate tickets. It was a solid vestibule train, as far as I know. It was vestibuled between the smoking-car and the first coach back. There was no platform provided for passengers alighting where Murray attempted to alight, the ground was just the same as you will get along any railroad track where they [79] haven't made provisions for passengers to get off—just like anywhere along the



(Testimony of William Thomas Moran.)

last fifty miles back. I don't remember whether I next saw the brakeman when we were putting the body into the car, or putting Murray into the car, or in the telegraph office, but I am inclined to believe it was around when I was sending the first telegram, after the body had been put on the train. I assisted in that. Conductor Spear, the doctor and the porter assisted. The porter, or waiter, I don't know which, was standing in the coach following the smoker, just inside the door, when Murray started to descend. When Murray went off, I says, "He is off." And then he stepped out and it was he that notified the trainmen. The conductor or any brakeman was not around then. The colored porter said nothing to Murray as he started to descend. It was quite a long way before we got to Santa Margarita—about half-past nine, or ten, fully an hour before we got there that Murray and Mulville were talking together when the brakeman said that the Hotel Santa Margarita was on the opposite side from the station. Then when the brakeman came into the smoking-car and beckoned to Murray, he says, "This is where you fellows get off." He then turned and went to the back platform, and Murray and I followed him. Murray was standing as close to the step there as he could, when the brakeman said, "There is your hotel up there." I was standing about on the bumpers, just between the cars, or perhaps a little bit over on that car that followed the smoking-car. The brakeman was down on the steps. He pointed up because we hadn't

(Testimony of William Thomas Moran.)

got up there yet. He leaned out and pointed up to the hotel, where we could see the lights of the hotel.

He says, "There is your hotel." The brakeman then got out, he was in a hurry. That is all the conversation I heard on the platform by anyone.

[80]

Cross-examination.

(By Mr. GILBERT.)

We left San Francisco at eight o'clock in the evening. The accident happened twenty minutes after eleven. About an hour before we reached Santa Margarita, I don't know whether Murray asked the brakeman or whether he volunteered the information in regard to where the Hotel Santa Margarita was situated. The brakeman told Murray. He said it was on the opposite side of the track from the depot. He advised Mr. Murray at that time that the hotel was on the opposite side of the railroad from the station. Before we reached the station he pointed out the hotel, on the opposite side of the station, saying "There is your hotel." Then he turned and walked away after he opened the vestibule door. He didn't say anything about getting off, which side we should get off on, while we were on the platform. Just opened the door and walked away. Murray then descended the steps with his grip in his left hand. He had hold of the hand-hold with his right hand. He did not turn his back to the engine while he was on the car. When he went out hanging onto this thing it swung him with his back to the engine. The train was going perhaps twelve miles an hour,

(Testimony of William Thomas Moran.)

perhaps more; I could not tell. I happened to look out. I was standing back from the steps, and I had to glance up that way to where the light was cast out of the car windows, and there I saw the ground. I saw Murray step off, he stepped like he thought there was another step or the ground. I think the train was going 12 miles an hour, fully that. He heard my warning and tried to recover himself. I was standing behind him. As soon as I saw the rapidity with which the train was moving, I saw it was dangerous, and I knew it wouldn't do for him to attempt to alight and I called to him. He tried his best to recover himself, but he could not get back. The train [81] ran about seven coaches from where he got off. I do not know anything when they opened that vestibule door; the one on the station side. It was not open when I was talking with Murray at the top of the stairs. We had not then reached the station yet. I do not know whether it was open when we reached the station. I have not been to Santa Margarita since the date of the accident. The Santa Margarita Hotel, is, I should judge, about between 300 and 350 feet—or perhaps 400 feet North, then West—from the line directly North—about 150 or 200 feet. The train traveled about 350 or 400 feet after Murray stepped off. He could see out, if he wasn't trying to see where he was stepping. I don't know how that looked to him from that position, I could not say down there.

(Testimony of William Thomas Moran.)

Redirect Examination.

(By Mr. BELL.)

The hotel is about 400 feet directly north, then west 150 or 200 feet. Murray fell about opposite the hotel, very nearly opposite the hotel.

(By Mr. GILBERT.)

Just opposite the hotel is where he started to get off, to save that walk.

(By Mr. BELL.)

We were getting off opposite the hotel because that is why we were directed to get off by the brakeman. That is the reason we went out that way, was to get to the hotel. We went out there because of the language and actions of the brakeman.

Q. And you went out there and started to get off because of the language and actions of the brakeman?     A. Yes.

By Mr. GILBERT.—We move to strike that out as leading and suggesting, and a conclusion of the witness. [82]

Mr. BELL.—That is only summarizing what the witness testified to.

Mr. GILBERT.—We object to the summary, then. (Discussion, and last question read.)

Q. (By Mr. BELL.) Now, instead of asking you in that from I will ask you again why did you and Mr. Murray leave that smoking-car, go to the platform and attempt to get off at that place?

Mr. GILBERT.—Objected to as improper and calling for a conclusion of the witness. Let him state what was said and the jury will then deter-



(Testimony of William Thomas Moran.)

mine why they went back and this man got off the train before it stopped.

Mr. BELL.—The trouble is you invited this very thing by your cross-examination, which assumed that he wanted to save time, and asked a question that contained two questions—“You got off there to save time”?

Mr. GILBERT.—I think the question asked was perfectly legitimate.

Mr. BELL.—Well, I will ask the witness to explain that answer.

Q. (By Mr. BELL.) You were asked by counsel on cross-examination if you started to get off on that side for the purpose of saving time, to which you answered, yes. Now, I will ask you to go on and further explain if you got off for any other reasons and what reasons and why.

A. I don't—Did I answer that question yes, that we got off to save time?

Q. You did, yes.

A. Well, I don't know as—what other reason we could possibly have got off there for. You understand we were in a town where neither of us had ever been before, and of course we wanted to—

Mr. GILBERT.—We object to voluntary statements and arguments on the part of the witness.

Mr. BELL.—No, I think that is explanatory.

The COURT.—Yes, proceed. [83]

A. (Continuing.) As I say, we had never been in the town before, neither one of us, and, and the brakeman had offered to show us where to get off,



(Testimony of William Thomas Moran.)

and whether you want to put it for saving time, or whatever the motive was, it doesn't make any difference to me. That is where we were to get off and go to the hotel.

The COURT.—The question is not whether it makes any difference to you; the question is what was your reason for getting off at that particular place.

A. Because we were directed to do so by the brakeman.

Q. (By Mr. BELL.) Was that the only reason?

A. Yes.

Q. (By Mr. GILBERT.) What did the brakeman say to you when he told you to get off while the train was in motion? Give us his words.

A. He came into the car at that time and says, "This is where you fellows get off," and beckoned us back and turned to the back end of the smoking-car and opened the trap-door.

Q. And says, "There is your hotel"?

A. And pointed out and says, "There is the hotel."

Q. What did he say to you about getting off when the train was going twelve miles an hour?

A. Absolutely nothing.

Q. What did he say to you about getting off and going to the hotel? A. Nothing.

Q. What did he say to you about anything except to point you out the hotel?

A. Nothing on the platform.

**[Testimony of A. B. Spear, for Plaintiff.]**

## Direct Examination

(By Mr. BELL.)

My name is A. B. Spear; I reside in San Francisco; I am a [84] railroad conductor in the employ of the Southern Pacific Company, in service about nineteen years, fourteen years a passenger conductor. I was conductor on the train leaving San Francisco in the evening of May 30, 1913, going to San Jose, Santa Margarita, and San Luis Obispo and other points south. This was No. 10, usually called the Sunset Express. E. Mulville was head brakeman. He had been on the run quite a while. I had known him perhaps two years before that time. There is a book of rules governing the operation of all trains. (Witness identifies book of rules, revised edition of August 1, 1907.)

Q. Are you acquainted with rule No. 750?

A. Yes, sir. (Examining book.)

Q. Will you read that rule?

Mr. GILBERT.—That is objected to as incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in the cause, no proof having been offered that the injured party was aware of the rule at the time of the alleged accident, no foundation having yet been laid for the introduction of testimony relative to the rule.

The COURT.—In what respect do you mean no foundation has been laid.

Mr. GILBERT.—As to knowledge on the part of the injured party relative to the operation of the

(Testimony of A. B. Spear.)

train and the rules governing its operation.

The COURT.—Let me see the rules. Which one is it, Mr. Bell?

Mr. BELL.—Rule No. 750. I will state to the Court that there are three rules contained in this book which we believe are material to the issue in this case. I will refer the Court and counsel to rule 816 and rule No. 837, and also to the general notice contained on the first page of the rules.

The COURT.—What is your theory, Mr. Bell—that the nonobservance [85] of these rules is in itself negligence *per se*?

Mr. BELL.—No, your Honor, we make no claim of that character. We appreciate the fact that in the case of violation of ordinances a violation of an ordinance would constitute negligence *per se* because made by public authority; but we offer these rules for the purpose of showing, of course, a violation of the rule upon the part of the brakeman—rules that are promulgated for the safety of passengers, as stated in the front page of the rule: “Obedience to the rules is essential to the safety of passengers and employees as to the protection of property”; and we make the claim that the violation of a rule that is laid down for the government of conductors and brakemen in the discharge of their duties toward the public is a circumstance which may be considered with other circumstances in the case going to show negligence upon the part of the defendant corporation, and particularly explanatory of the actions of the brakeman in his conduct toward this particular passenger.

(Testimony of A. B. Spear.)

The COURT.—I would suppose that it would be the act itself which would speak, either by way of negligence or otherwise of the agent or defendant and that the fact that he was or was not obeying a particular rule would be beside the question to be determined by the jury.

Mr. BELL.—I do not believe the rules are conclusive evidence of negligence; I believe rules can be broken by the railroad employees and still it might not be a case of negligence; but I believe it to be a circumstance as throwing light on that situation. As we claim, the brakeman came in and invited Mr. Murray to alight, opened the vestibule doors before the train stopped, in violation of the rule that declares that he should not open them until the train came to a standstill. He pulled [86] up the trap-door, didn't open the doors on the station side at all, leaving Mr. Murray's only alternative to go out in the manner that he did, and it seems to me that it certainly cannot be of injury to the defendant corporation to prove the existence of these rules, and certainly it must assist the jury in taking that entire situation into consideration to determine whose negligence was the proximate cause of the injury.

Mr. GILBERT.—For the purpose of the record, may I inquire of counsel, does he make the statement that the door on the station side was not opened?

Mr. BELL.—We expect to show that by the proof. (Discussion.) If the Court will permit, I will with-

(Testimony of A. B. Spear.)

draw the presentation of these rules at this time, and then if, during the trial of the case, a situation should develop that we believe the rules are competent under the views of the Court, we will ask leave to present the question again.

The COURT.—Very well, it may be withdrawn, then, without prejudice.

Mr. BELL.—That is all.

Mr. GILBERT.—That is all.

**[Testimony of Mary Murray, for Plaintiff.]**

Direct Examination.

(By Mr. BELL.)

My name is Mary Murray; I live at San Francisco. and am the widow of Henry Murray. We were married January 6, 1900. I have one child living, two dead. The name of the living child is Lena Murray. I was born and raised in San Francisco. My husband was thirty-three years of age—no, forty-three. He had a grocery and bar business. The family lived upstairs. He had two young boys to assist him; they boarded and lodged with me. We were in that business about 12 years. He owned that a short time before our marriage. We lived there all our married [87] life. Mr. Murray was very healthy, strong and good-natured. He was a very kind, loving, and a good husband. He properly provided for us every comfort and convenience, and clothed and sent the little girl to school. She went to the Mission school near where we lived, in the Mission district. His profit was about \$100.00 a month, after paying all help and other expenses.



(Testimony of Mary Murray.)

He had no other business or income. I am 39 years of age. Lena will be 12 on April 18, 1915. We are now living with my mother in San Francisco.

No cross-examination.

**[Testimony of Lena Murray, for Plaintiff.]**

Direct Examination.

By Mr. BELL.—She is under twelve, if the Court please; perhaps the Court might want to examine her.

Mr. GILBERT.—I raise no question, your Honor.

Witness, examined by the Court, testified that she is 11 years of age, will be 12 the 18th of April, 1915; that she is in the high fourth grade at school, where she has been attending since she was six years of age; that she knows what it means to take an oath to tell the truth and nothing but the truth, and that she has never before been a witness. Thereupon the Court pronounced her competent to testify as a witness in this case.

My name is Henrietta Lena Murray. I live at 276 Paige Street, San Francisco. I am 11 years of age. I remember the day papa left home to make a trip with Mr. Moran. I think it was Decoration Day. I put a piece of red, white and blue ribbon in his buttonhole, because it was Decoration Day. I can remember him from about the time I was six years of age. He was always very good to me. On Sundays when I went to church, he would give [88] me money for the poor box, and a nickel for myself. He would give me money at other times, and every Saturday he would give me money. He

(Testimony of Lena Murray.)

always took me on his knee when he came home for supper or dinner, and kissed me and sang for me. He did not go away from home often. During the day I would go to the grocery store and stay with him, and run errands after school. I would run around and get the orders for groceries and provisions and things of that kind. He had over 100 customers; I saw so many of them. I went down to the car with him the day he left. I never saw him again until after the accident.

Mr. GILBERT.—No cross-examination.

Mr. BELL.—Plaintiff rests.

**[Testimony of Edward Mulville, for Defendant.]**

The defendant then proceeded to offer its evidence, EDWARD MULVILLE, witness for defendant.

Direct Examination.

(By Mr. GILBERT.)

My name is Edward Mulville. I am a railroad brakeman. I remember the occasion of Henry Murray's being injured on May 31, 1913. I was a brakeman on that train, having been in service eleven years. Train left San Francisco that evening at four o'clock. I saw him coming on the train at San Francisco. Could not say who was with him; recognized him by his Panama hat. Do not remember seeing him again until after train left Gonzales at eleven o'clock that evening; he came forward and said: "Why, I know you, don't I?" to which I replied, "Why, certainly," mentioning his name. I recognized his voice. Had not seen him for about seven years, and he had grown a good deal stouter.

(Testimony of Edward Mulville.)

He asked me how long I had been in the service, to which I replied about ten years. I then excused myself, saying that I had not yet been to supper, and went back to the dining-car. After [89] leaving Colburn, while he and Mr. Moran, his companion, were playing cribbage, I went up and talked to him for a while. We spoke about some of the old employees. I then called out Kings City Station, and upon coming back he said: "Well, I would like to see this country during the daytime." I said, "How far are you going"? and he said, "To Santa Margarita." I said, "You can see that all right; I will let you know later on." He was on the station platform at Paso Robles. Going into Santa Margarita, after the station whistle had been sounded by the engineer, I went through the chair-car and twice announced the station, came out of the chair-car, opened the vestibules on the station side, went into the smoker, called out "next station is Santa Margarita," advanced to the middle of the car, called out "Santa Margarita" again—my intention was to go to the forward part of the smoking-car. Mr. Murray was standing clear of the aisle in the center of the car, on the right-hand side, and he said, "Good-night, Ed." I said, "Here, this is where you get off; you can get out here in the morning on train 231 at 7:28." That was in answer to his question some time previous when he wanted to know what would be a good train to get out on in order that he could see the country during the daytime. He then asked me, "Where is the Santa Margarita

(Testimony of Edward Mulville.)

Hotel?" He was then standing on the right-hand side I said, "The Santa Margarita Hotel is on this side and the station is on this." He said, "Do you think the dining-room would be open so that I could get something to eat?" I said, "Why, I don't know; it is pretty late." "Gee!" he said, "I am hungry; I would like to get something to eat." I said, "Well, you might find an enchilada parlor open, or something of that kind." [90]

When I called the station first, Mr. Moran was sitting on the left-hand side. He stepped right up and took a suitcase and put it in the middle of the aisle and started to adjust the straps on it. When he heard Mr. Murray ask me these questions, he arose immediately and he was listening to the conversation. After I told him about the enchilada parlors, I said, "Now you will have to wait, because we stop here a little while, say about ten minutes, and we take water, and also pick up a helper." He said, "Well, can't you let me over there right away?" I said, "No, the station is on that side, and that is the side you will have to alight on." He said, "I am awfully hungry." I said, "Didn't you have anything to eat in the dining-car?" He said, "No, I didn't have a thing to eat since I left San Francisco." We were almost getting to the station then, and I didn't have time to go to the head end of the car, but I went toward the head end of the car and turned around and came back to Murray, and said, "Here, I will tell you what I will do. At this station, on account of picking up a helper, I will open



(Testimony of Edward Mulville.)

the trap and then when the train stops you can cross over, and when it does stop it will be almost directly opposite the hotel." I went back and I opened the vestibule, and I was standing there, and Mr. Murray came along. He did not have his suitcase when I saw him, but he brought it with him, and it was lying next to him. I opened this vestibule. I did not point out the hotel, because I couldn't, we hadn't arrived to it yet. I said, "Do you see the lights over there? That is Santa Margarita." And he was inside the car at all times, leaning against the door, and he pulls his head around and looks over. We had three passengers to get off at that point, and one of them was in the forward car, the smoking-car. I looked forward and the man was reclining something in this manner, as [91] though he had went to sleep, so I went into the car and went up to him and called out, "Santa Margarita," and he turned his head and I looked back and by that time Mr. Moran was standing in the vestibule—not in the vestibule, but clear of the vestibule, inside of the car, close to the door. Then I went and opened the vestibule door on the station side, and just as I got the vestibule open the train came to a standstill, and I looked back and Mr. Murray was still on the inside of the car, and at no time was he out in the vestibule while I had any kind of a conversation. I coupled on the helper, then I crossed over the—the helper was on the siding opposite the station side. I got on the head-end of it, brought it out on the main line, backed down, coupled on to the train, and was in the



(Testimony of Edward Mulville.)

act of coupling the hose when the porter comes in and says, "Get a stretcher." I says, "What do you want a stretcher for"? and he says, "That friend of yours fell off the train, and we think he is killed." So I went to the baggage-car and got a stretcher and took it back and while they were putting him on there I went up ahead and got the emergency box. The last time I saw Murray and his friend they were standing on the end of the smoker; Murray was leaning up against the open door of the smoker and Moran was standing opposite; both were inside of the car. I opened the vestibule door for the purpose of going over and getting my helper; not so much for getting off there, but for getting on after I coupled the helper on. The helper and everything is there for the purpose of coupling up, and in order to do that, that side is opposite the station, and wherever that is an interference with the main line, wherever there is a grade or anything of that kind, the rules require to run the air test made by the engineer, after the train assumed a speed of six miles an hour. We are required [92] to keep trespassers off trains, and at all these watering stations, especially Santa Margarita, at different times there are trespassers—in other words, hoboes. There are usually from ten to eleven there. My reason for opening the door was to get on that side, because I generally ride the tender out of the station, and then the speed is picking up I drop off the train and catch that side. I boarded the train while it was in motion.

(Testimony of Edward Mulville.)

Q. Did you at any time invite or suggest to Mr. Murray that he alight on the right-hand side of the train?

A. No, sir, I never suggested anything of the kind, for him to alight on that side.

Q. Did you advise him that the vestibule doors would be opened on the station side? A. I did.

Q. Did you open them on the station side?

A. I did. At the time I opened that vestibule door, we were traveling not more than twelve miles an hour; that is my judgment.

Cross-examination.

(By Mr. BELL.)

I opened the vestibule doors on the rear of the smoker on the station side going into Santa Margarita station; before I arrived at the station; I was clear of the westbound switch. The vestibules of the station side door were open before I saw Mr. Murray at all; before I announced Santa Margarita in the smoking-car; the train was still in motion preparatory to making the station stop; going about twelve miles an hour, when I opened the vestibules on one side. Afterwards I opened them on the right-hand side towards the hotel, when I saw I couldn't make the smoker; [93] when I opened the vestibule on the hotel side we were not going twelve miles an hour; we were less than that. I had already opened the vestibule on the station side, before I opened them on the other side. After opening the vestibule doors on the station side, I went into the smoker to announce the station. Mr. Murray was

(Testimony of Edward Mulville.)

already standing; Mr. Moran was sitting on the left-hand side, and he immediately got up and got his suitcase. I went right up in the middle of the car, and called again, and was talking with Mr. Murray. I then went back again when I saw I couldn't make the head end, because we were going too slow—the speed was being reduced all the time. Wanted to get to the head end of the smoker. I went on back when I saw I couldn't make it. They did not follow me directly. I had already had the vestibule door open; the vestibule door—I just opened the vestibule door on the hotel side when Mr. Murray came up there. I says, "See the lights over there? That is Santa Margarita." Apparently he followed up very closely to me. It took about twenty seconds or something like that to open the vestibule doors on the hotel side. By the time I got it open, he evidently followed me—he wasn't close to me, he was standing right inside of the car. He didn't come out on the platform at all; neither he nor Mr. Moran came out on the platform when I opened that door. I then squeezed by Mr. Murray. He was standing up against the door. He was rather stout.

Q. How fast was that train going when you opened the vestibule doors on the station side?

A. About twelve miles.

Q. Were you not violating a rule of the company?

A. I don't know that I was.

Q. Were you not violating Rule No. 837 when you opened those vestibule doors before the train came to a standstill? [94]

(Testimony of Edward Mulville.)

We were all inside the station limits. I was not violating the rule. I can recite it—that trap-doors inside those vestibules must be kept closed while the train is in motion. I opened those vestibule doors on the station side while the train was going about twelve miles an hour and they were open until the train came to a standstill at the station. The third passenger walked back towards the rear *or* the smoking-car and got off the rear end of the smoking-car. I did not see him get off. He got off, because he wasn't on there when we went on. I do not know whether he passed on through to another coach or not. He could not get off farther back, because there were no doors open farther back on either side. Those were the only doors open on the station side. The chair-car was next to the smoker, and where Murray got off was the only place at that time where doors were open. I testified before the coroner at San Luis Obispo. There was but one vestibule door open on the opposite side and three on the station side. The one on the opposite side was the one where Mr. Murray went out. Those doors right at that point—I don't know anything about any doors being open farther back on the train. I did not open the vestibule on the opposite side of the train on the front end of the smoker. (Portion of testimony before the coroner read as follows.)

Q. "A. Yes, sir, I looked out first, it is a passing track there and I looked out to make sure. Q. Do you know, Mr. Mulville, whether there were any other of the vestibule doors on that train open, on



(Testimony of Edward Mulville.)

that side of the train? A. There was one on the head end of the smoker, just as we got into Santa Margarita. I opened it to get off on that side to get the helper in.” Did you so testify. A. No, sir, I did not. [95]

Q. I will read a little further: “Q. In other words, merely two vestibule doors, one on the front and one on the rear end of the smoker were the only vestibule doors that were open on the side opposite from the depot at Santa Margarita? A. Yes, that is, on the engineer’s side.” That is your answer. “Q. That was done at Mr. Murray’s request—as a matter of accommodation to Mr. Murray? A. At his request and as a matter of accommodation.” Now, I ask you did you open that vestibule door at the rear end of that smoker, on the wrong side of the train, for your own accommodation or for the accommodation of Henry Murray? A. For my own accommodation.

Q. Why did you testify, then, at the coroner’s inquest if you did testify—?

A. I will say candidly that I don’t remember testifying to that question. I don’t remember the question being asked or answering it. And furthermore, regarding the question by Mr. Kaetzel, I don’t remember him asking that question. It was the coroner asked it. He says, “Were there any other doors open on the opposite side”? I says, “No, sir.” Then he says, “There was but one door open on that side?” I says, “Yes, sir.”

Mr. BELL.—Have you a certified copy of the cor-



(Testimony of Edward Mulville.)

owner's inquest here?

Mr. GILBERT.—No.

Q. (By Mr. BELL.) Then you didn't so testify?

A. No, sir, I didn't so testify. I opened the trap-door on the vestibule for my own accommodation, and not for the accommodation of Henry Murray.

Q. I will ask you if you didn't testify as follows:

“Q. The vestibule doors of the rear cars? A. Yes, sir, that was done after we left the west switch.

Q. You do that as you are coming [96] into the station? A. Yes, I was doing it as we—were coming into Santa Margarita. When I met Mr. Murray in the smoker, I was pressed for time to get to the head end and I went right back and done it, and the last I see of him he was standing in the door of the smoker at the rear end, and I had to squeeze myself by, he was a man of large proportions and I was going to say something in a joshing manner, but I left him there, I didn't have time to talk. Q. The right of way was clear? A. Yes, sir, I looked out at first, it is a passing track there and I looked out to make sure.” Was there a passing track there where Mr. Murray got off?

A. There is a siding there on that side; the siding is on that side. I looked out there to make sure that there was no train in there because after telling him the conditions that I was working under there, I told him he could get off—after telling him he would have to get off at the station side, that he could cross over, if there was a train there I could have told him there was one there, and he would have to

(Testimony of Edward Mulville.)

wait any way. I looked out to see if the track was clear, on my own account. If there was any train in there, I wouldn't have to get off on that side for the simple reason that the helper would be on the house track; I would then go over on the house track. I looked out partly for Mr. Murray. If there was a train there I could have told him. I told him when the train stopped the rear end of the smoking-car would be almost directly in front of the hotel. I did not tell him anything about crossing over the right of way; I said he could go over the right of way; he would have to cross over the right of way to get there. I didn't say anything about crossing over the right of way at all; I said he could get there right away, without having to wait. He said "All right, I will do it." That he could [97] cross over. I did not know when I left him that he was going to get off on that side; to all intents and purposes he looked as if he was going to get off on the station side. I looked out to see if everything was clear; I had already told the man that he would have to get off on the station side, and that he could cross over. I didn't believe he was going to get off on that side. He was going to cross over there when the train stopped. I told him that after the train came to a stop he could cross over from one side of the train to the other through the vestibule. I did not tell him that I had to open up that vestibule to get back onto the train, I says, "Here, on account of picking up a helper I will open the vestibule on that side." I told him that just as a matter of accommodation,

(Testimony of Edward Mulville.)

so that while we were standing there he could cross over and go to the hotel. I was going to open this door anyway. I did not tell him anything about my climbing back onto the train at all. I told him I had to open one there on the opposite side of the train. I told him about this door being opened on the opposite side in order that he could cross over and not wait the ten minutes. He would, after the train was at a standstill, have to pass down those steps on that side in order to get through. I was trying to accommodate him, in that way. It was not a short cut, it was a saving of time. There was a porter on the head end of the chair-car to assist him and Mr. Moran in getting off that night. The porter's duty was not restricted to the chair-car, but included the whole train. He assists ladies; it did not appear that Mr. Moran and Mr. Murray wanted assistance. The porter was there, and the conductor came on afterwards. Right at that juncture I went to get that other passenger off, who was apparently asleep. I notified him and then went on to the front end of the smoking-car. We had but one baggage-car that night. There was one occasion before that I almost got injured in getting [98] back on the train through the vestibule door on the front end of the smoking-car, in alighting from the tender of the road engine. I didn't have sufficient time to get my balance and catch the head end of the smoking-car. Sometimes we have two baggage-cars, and in that case I would open the head end of the smoking-car so as to get on. But these cars are only sixty feet

(Testimony of Edward Mulville.)

long, and you are going at a fast rate of speed, and sometimes when you are alighting on the ground you can't go to work and get your balance in order to catch the head end of the smoking-car. From Santa Margarita to San Luis Obispo we had two engines, and I went up on the fireman's side and went around to the head end of the engine and got the engine off the siding, which is up on the opposite side of the station. In getting back aboard the train, I had a hand-lamp, and I would ride the tender of the train to—well, about a half mile out of town in order to keep the hoboes off the head end of the train; then I would drop off, and jump on again, about a half mile out, after the speed had been reduced to six miles an hour. They would reduce the speed for me, for the rules require a running test of air. That running test is made by the engineer by a reduction of the train pipe pressure, and the brakeman on the rear end stations himself on the platform where the retainer is placed, because the exhaust valve is there, and when the air exhausts through that, he knows the train line is coupled up all the way through. That is also done at the beginning of a grade—the San Luis Obispo mountain grade. That rule also requires that when the train line is in the clear—

Q. I will ask you if you did not testify as follows before the coroner's jury: "Q. Do you ordinarily open the door on that side of the train? A. Not ordinarily—it was case of this man. I [99] have known Mr. Murray for the last fifteen years, I was coming into the smoker, I had a little call at the



(Testimony of Edward Mulville.)

station in the chair-car and I was going through and he was standing in the middle of the smoker and he said, "Good night," he called me by my first name, and he said, "Well, I won't see you again," and I said "If you want to get out here, there is number 23, you are leaving Santa Margarita at 7:28 in the morning," he had already requested me to let him know what was the best train to take to see the country during the day and I told him, and I bid him good night,—and he says, "Where is the Santa Margarita Hotel," and I says, "It is on the opposite side from the station, the station *in* on one side and the Margarita Hotel is on the other," and I says, "You will see it just as we are going in there." He says, "I am hungry and I want to get off on that side." "Well," I says, "I will tell you what I will do, I will open this door—" "— What door did you refer to?

A. I didn't say "I will do it." I says, "I open the door." You said, "I will tell you what I will do."

A. Well, give me the question again, please.

Q. "Q. Do you ordinarily open the door on that side of the train? A. Not ordinarily—it was case of this man."

A. No, I didn't answer that way. I didn't say anything about the case of a man at all. That answer there was in answer to a question by the coroner, and he says, "Tell what you know about the case," and I started right in then to say that I knew Mr. Murray for fifteen years—

Q. Now, wait a minute, and I will show you this.



(Testimony of Edward Mulville.)

“Now,” I says, “I will tell you what I will do, I will open this door and you get off and go over the right of way, it will save you five or ten minutes as we take water.” Now, I ask you, when you answered that, if you did so answer it, what door did you refer to—  
“I will open this door?” [100]

A. Why, I didn’t say, “I will open” it. When I answered that question, I says, “I will tell you what I do. I open the door on that side.” I was referring to the opposite side from the station, to the side the hotel was on. And I opened it, and informed him that I did it. I didn’t tell him he could get off at all. I had already told him where the station was, which side it was on, and told him he could cross over. (Witness examining transcript.) Now, referring to this, “Do you ordinarily open the door on that side?” I don’t ordinarily open the door on the opposite side of the train. The coroner then asked me: “Tell what you know about the case.” Then I started in: “I have known Mr. Murray for the last fifteen years. I was coming into the smoker—I didn’t say anything about—I did not make the answer that has been read by Mr. Bell. I said I had known Mr. Murray for the last 15 years, and coming into Santa Margarita I had already called out the chair-car, that I was going into the smoker to call out the station and Mr. Murray was standing on the right-hand side of the smoking-car, and then he asked if I knew where the Santa Margarita Hotel was, and I said, “Yes, the Margarita Hotel is on this side and the station is on this side.” He then said,

(Testimony of Edward Mulville.)

“Do you think the dining-room will be open?” I says, “I don’t know.” He says, “I am pretty hungry.” He didn’t have anything to eat. And regarding this, about opening the trap, I had already left him and came back, and I says, “I will tell you what I do, I open the vestibule on that side, and when the train stops you can cross right over there, and when it does stop it will be almost directly in front of the hotel.”

Redirect Examination.

(By Mr. GILBERT.)

Murray was picked up about 300 feet from where the car [101] stopped—the train had run about three hundred feet—about four cars. Murray was perfectly sober. When the vestibule door on the station side was opened, the train was going about twelve miles an hour; when the vestibule on the opposite side was opened about seven or eight miles.

(Witness excused.)

**[Testimony of A. B. Spear, for Plaintiff, in  
Rebuttal.]**

Direct Examination.

(By Mr. BELL.)

I do not recall having had any conversation with the brakeman as to why he had opened the vestibule door on the opposite side of the train.

(At request of Mr. Bell, witness examines the transcript of testimony given by him before the coroner at the inquest.)

Q. Let me read it to you now: “Q. I would just like to ask you what the regulations or rules of the

(Testimony of A. B. Spear.)

company are as regards opening of the vestibule doors as applying to the Santa Margarita Station.

A. It is customary for passengers to detrain at the station side there as other places, there is a positive injunction against opening the vestibule doors opposite the station on double track." You so testified, did you? A. Yes.

Q. And that is correct, the matter you testified to?

A. Yes.

Q. "Is there double track at Santa Margarita?"

A. No, perfectly clear, that is no side track close to the track there." Is that the fact?

A. Yes, sir. [102]

Q. "Q. Then what would be your understanding that this positive rule forbidding the opening of vestibule doors on a side opposite the depot would apply to Santa Margarita? A. Well, no, I don't think so; in the case of this man, as I hear the brakeman say, it was an accomodation for the passenger who wished to go to the hotel, we are delayed there for five minutes always and sometimes longer, and he was expected to cross over there, or leave from that side of the train after the train had stopped."

Now, does that refresh your recollection.

A. Well, I suppose I testified to that.

Q. Did you hear the brakeman say why he had opened that vestibule door?

A. Well, that particular one being near or opposite the hotel would allow the passenger to cross over after the train has stopped, I think, as I understood it at that time. This was done to allow him to cross

(Testimony of A. B. Spear.)

over, but not to get off. He could get off at the station after the train was stopped, and then go on back through two vestibule doors and across the platform and then over to the hotel. He would have either to go around the end of the train to the hotel or while the train was standing still he could cross through. I gave no one permission to cross over that train while it was in motion, or to alight.

Q. I will ask you if you didn't testify as follows:

"Q. Who gives the brakeman instructions regarding which side of the train they shall open the vestibule doors. A. There are no instructions. Q. There is a regular set of rules governing these things?

A. There is a custom and rules covering that.  
[103]

Q. They are supposed to be familiar with them?

A. Yes.

Q. Would you understand then, when Mr. Mulville opened this door, the vestibule door on the side of the train opposite from the depot to permit this passenger to alight on that side, that he was violating a rule of the company?" I call your attention to that question asked you by the coroner. "A. Well, if the passenger was not to alight until the train had come to a stop I think it would be perfectly safe." Did you so testify?

A. I suppose I did. A conductor is required to give no instructions in a case as to how those things are to be done.

Q. I asked you if you didn't testify as follows, and

(Testimony of A. B. Spear.)

if that doesn't correctly state the fact: Q. Would you understand then when Mr. Mulville opened this door, the vestibule door on the side of the train opposite from the depot to permit this passenger to alight on that side, that he was violating a rule of the company? A. Well, if the passenger was not to alight until the train had come to a stop, I think it would be perfectly safe."

Q. You so testified, did you not?

A. Yes, sir, I guess I did, and I intended to testify to the truth when I so testified.

(Plaintiff rests.) [104]

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[Title of Court and Cause.]

**Defendant's Motion for Nonsuit (in Bill of Exceptions).**

Now comes the defendant, Southern Pacific Company, and moves the Court for a nonsuit; First, for the reason that the testimony offered is insufficient in law to establish a cause of action in favor of the plaintiffs and against the defendant company; second, for the further reason that the testimony offered fails to develop any act of negligence on the part of the defendant company from which the accident complained of resulted; third, for the reason that if negligence on the part of the defendant company has been shown as matter of law or fact in the opening of the door, then the deceased himself contributed to the injury by attempting to alight from the train while it was moving, as shown by the plaintiffs' testimony, at the rate of ten or twelve



miles an hour; and, fourth, for the further reason that the deceased having seen fit to alight from the train on the nonplatform side, while the train was in motion assumed the risks which were incidental to his attempt to alight.

HENRY T. GAGE,

W. I. GILBERT,

Attorneys for Defendant. [105]

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*In the District Court of the United States of  
America, in and for the Southern District of  
California, Southern Division.*

#279.

MARY MURRAY, and LENA MURRAY, a Minor,  
by Her Guardian *ad Litem*, MARY MUR-  
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendants.

**Stipulation (in Bill of Exceptions) [as to Testimony  
and Evidence on New Trial, etc.].**

WHEREAS a trial of the above-entitled action was had in the above-entitled court on the 27th and 28th days of November, 1914, the Court sitting with a jury, and a verdict and judgment was therein rendered and entered, in favor of the plaintiffs, and against the defendants, in the sum of five thousand dollars; and

WHEREAS thereafter, upon motion of the defendant for a new trial in said cause, the said verdict

and judgment was by the Court vacated and set aside; and

WHEREAS said cause has been set for trial in said court on the 7th day of September, 1915, at the hour of ten o'clock in the forenoon; and

WHEREAS it is deemed convenient by the parties hereto to submit said cause to said Court, sitting without a jury, upon all of the testimony and evidence taken and heard therein upon the said previous trial in said court, for the sole purpose of [106] permitting the defendant to move for a nonsuit therein upon any grounds which may be designated in said motion;

Now, therefore, it is hereby stipulated by the parties hereto that at the time said cause is called for trial on September 7th, 1915, at the hour of ten o'clock in the forenoon of that day, or at such time as the trial thereof may be continued by order of the Court or agreement of counsel herein, all of the testimony and evidence given and received upon the previous trial of said cause may be submitted to the Court, sitting without a jury, as fully and with like force and effect as though said testimony and evidence were actually given, admitted and heard upon a trial of said cause; that upon the submission of said testimony and evidence the defendant shall move for a nonsuit and dismissal of said action, upon such grounds as the defendant may specify in said motion; and thereupon said motion for a nonsuit shall be heard and determined by the Court; provided, however, that nothing herein contained shall be so construed as to prevent or affect the right of either or any of the parties hereto to appeal from

any order which may be made and entered upon the hearing and determination of said motion of nonsuit; and said order shall be deemed to be excepted to.

Dated August 26, 1915.

THEODORE A. BELL and  
MILTON K. YOUNG,

Attorneys for Plaintiffs.

HENRY T. GAGE and  
W. I. GILBERT,

Attorneys for Defendant. [107]

The foregoing engrossed bill of exceptions is presented by the plaintiffs for settlement as the bill of exceptions in said case to be used upon appeal or any motion or proceeding to be taken herein.

Dated this First day of October, 1915.

THEODORE A. BELL and  
MILTON K. YOUNG,

Attorneys for Plaintiffs.

**[Stipulation for Settlement of Bill of Exceptions.]**

IT IS HEREBY STIPULATED AND AGREED between the attorneys for the plaintiffs and defendants, that the foregoing bill of exceptions has been correctly engrossed, and that the same is correct and may be settled and allowed.

Dated this First day of October, 1915.

HENRY T. GAGE and  
W. I. GILBERT,

Attorneys for Defendant.

**[Order Allowing Bill of Exceptions.]**

The foregoing bill of exceptions on behalf of the plaintiffs having been examined by me and found correct, is hereby certified by me as being correct and

is allowed as the engrossed bill of exceptions in said case, to be used upon appeal or any motion or proceedings to be taken herein.

Dated this 5th day of October, 1915.

BLEDSOE,  
Judge. [108]

[Endorsed]: Original. No. 279—Civil. In the District Court of the United States of America, in and for the Southern District of California, Southern Division. Mary Murray, et al., Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Bill of Exceptions. Received Copy of the Within Bill of Exceptions this 1st day of October, 1915. Henry T. Gage and W. I. Gilbert, Attorneys for Defendant. Filed Oct. 15, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Milton K. Young, Atty. at Law, 716 Union Oil Bldg., Los Angeles, Cal., Attorney for Plaintiffs. [109]

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*In the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division.*

MARY MURRAY, and LENA A. MURRAY, a  
Minor, by Her Guardian *ad Litem*, MARY  
MURRAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.

**Petition for Writ of Error**

Mary Murray and Lena Murray, a minor by her

guardian *ad Litem*, Mary Murray, plaintiffs in the above-entitled cause feeling themselves aggrieved by the judgment entered on the 7th day of September, 1915, in the above-entitled cause, come now by Theodore A. Bell and Milton K. Young, their attorneys, and file herewith assignments of error, and petition said Court for an order allowing the said plaintiffs to procure a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided. And also that an order be made fixing the amount of security which the plaintiffs shall give and furnish upon said writ or error, and that a transcript of the records, proceedings and papers on which said judgment was made and entered, duly authenticated, may be sent to the Circuit Court of Appeals of the United States, for the Ninth Circuit.

THEODORE A. BELL and  
MILTON K. YOUNG,

Counsel for Plaintiffs in Error. [110]

[Endorsed]: Original. No. 279—Civil. In the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division. Mary Murray et al., Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Petition for Writ of Error. Filed Oct. 15, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Milton K. Young, Atty. at Law, 716 Union Oil Bldg., Los Angeles, Cal., and Theodore A. Bell, Attorneys for Plaintiffs. [111] |



*In the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division.*

MARY MURRAY, and LENA MURRAY, a Minor,  
by Her Guardian *ad Litem*, MARY MURRAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.

**Assignments of Error.**

Now comes the above-named plaintiffs in error, by Theodore A. Bell and Milton K. Young, their attorneys, and file the following assignments of error upon which they will rely for the prosecution of the writ of error in the above-entitled cause, petition for which writ of error is filed at the same time as this assignment of errors:

I.

That the Court erred in granting defendant's motion for nonsuit, to which ruling of the Court plaintiffs by their counsel duly excepted.

II.

The Court erred in granting defendant's motion for nonsuit because the evidence showed that the accident complained of was the result of the negligence of the defendant and that [112] deceased was not guilty of such contributory negligence which, as a matter of law, would preclude the plaintiffs' right to recover.

## III.

The Court erred in granting defendant's motion for nonsuit because the evidence showed that the accident complained of was the result of the negligence of the defendant.

## IV.

The Court erred in granting, making, rendering and entering a judgment of nonsuit in said cause in favor of the defendant and against the plaintiffs.

WHEREFORE, the plaintiffs pray that the judgment of said Court be in all things reversed.

THEODORE A. BELL and

MILTON K. YOUNG,

Counsel for Plaintiffs in Error.

[Endorsed]: No. 279—Civil. In the Circuit Court of the United States, Ninth Circuit. In and for the Southern District of California, Southern Division. Mary Murray et al., Plaintiffs, vs. Southern Pacific Company, a corporation, Defendant. Assignments of Error. Filed Oct. 15, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Milton K. Young, Atty. at Law, 716 Union Oil Bldg., Los Angeles, Cal., and Theodore A. Bell, Attorneys for Plaintiffs. [113]

*In the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division.*

MARY MURRAY and LENA MURRAY, a Minor,  
by Her Guardian *ad Litem*, MARY MURRAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
tion,

Defendant.

**Order for Writ of Error.**

Upon motion of Theodore A. Bell and Milton K. Young, attorneys for plaintiffs, and upon filing a petition for a writ of error and assignment of errors,

IT IS ORDERED, that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals, for the Ninth Circuit, the judgment heretofore entered herein.

IT IS FURTHER ORDERED, that the plaintiffs in error file a good and sufficient bond in the penal sum of \$250.00 that they will prosecute their writ of error to affect, and that if they fail to make their plea good, that they shall answer all costs herein.

Dated this 28th day of October, 1915.

BLEDSON,

Judge.

[Endorsed]: Original. #279—Civil. In the Circuit Court of the United States, Ninth Circuit,

in and for the Southern District of California, Southern Division. Mary Murray et al., Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Order for Writ of Error. Filed Oct. 28, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Milton K. Young, Atty. at Law, 716 Union Oil Bldg., Los Angeles, Cal., and Theodore A. Bell, Esq., Attorneys for Plaintiffs. [114]

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*In the District Court of the United States of America, in and for the Southern District of California, Southern Division.*

No. 279.

MARY MURRAY, and LENA MURRAY, a Minor,  
by her Guardian *ad Litem*, MARY MURRAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
tion,

Defendants.

**Cost Bond.**

KNOW ALL MEN BY THESE PRESENTS: That NEW ENGLAND EQUITABLE INSURANCE COMPANY, a corporation, is held and firmly bound unto Southern Pacific Company, a corporation, defendant above named, in the sum of two hundred and fifty dollars (\$250), lawful money of the United States, to be paid to it, or its successors; to which payment, well and truly to be made, we bind

ourselves, and our successors, by these presents.

WHEREAS, lately at the July term of the above court, in a suit depending in said court between Mary, and Lena Murray, a minor by her guardian *ad litem*, Mary Murray, plaintiffs, and Southern Pacific Company, a corporation, defendant, judgment was rendered against the said plaintiffs, and the said plaintiffs have obtained a writ of error of the said Court to [115] reverse the judgment in the aforesaid suit, and a citation directed to the said defendant, citing and admonishing it to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, at the City and County of San Francisco, thirty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said plaintiffs shall prosecute said writ of error to effect, and answer all damages and costs if plaintiffs fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

IN WITNESS WHEREOF said corporation has hereunto caused its name to be subscribed, and its corporate seal to be affixed, this 1st day of November, 1915.

NEW ENGLAND EQUITABLE INSURANCE COMPANY.

[Seal] By THEODORE P. STRONG,  
Attorney in Fact.

[Two canceled revenue stamps.]



State of California,

City and County of San Francisco,—ss.

On this 1st day of November in the year one thousand nine hundred and fifteen, before me John E. Manders, a notary public, in and for the said city and county, residing therein, duly commissioned and sworn, personally appeared Theodore P. Strong known to me to be the person whose name *his* subscribed to the within instrument, as the attorney in fact of the New England Equitable Insurance Company, the corporation described in the within instrument, and also known to me to be the person [116] who executed it on behalf of the corporation therein named, and the said Theodore P. Strong acknowledged to me that he subscribed the name of the New England Equitable Insurance Company thereto as principal and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the city and county of San Francisco, the day and year in this certificate first above written.

[Seal]

JOHN E. MANDERS,

Notary Public in and for the City and County of San Francisco, State of California. 1303 Hobart Building, 582 Market Street.

My Commission expires January 26, 1919.

[Endorsed]: 279. District Court of the United States, Southern District of California. Mary Murray, and Lena Murray, a minor, etc., Plaintiff, vs. Southern Pacific Company, a corporation,

Defendant. Cost Bond. Approved Nov. 8, 1915.  
Bledsoe, Judge. Filed Nov. 9, 1915. Wm. M. Van  
Dyke, Clerk. By R. S. Zimmerman Deputy Clerk.  
[117]

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UNITED STATES OF AMERICA.

*District Court of the United States, Southern  
District of California.*

Clerk's Office.

No. 279

MARY MURRAY and LENA MURRAY, a Minor,  
by Her Guardian *ad Litem*, MARY MUR-  
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

**Praeceptum [for Transcript of Record].**

To the Clerk of said Court:

Sir: Please prepare a transcript for me upon the writ of error in the Circuit Court of Appeals of the Ninth Judicial Circuit of the record in the above-entitled case, and include therein the plaintiff's complaint, the summons, the defendant's answer; the order of nonsuit and judgment thereon; the bill of exceptions as settled and allowed containing the testimony submitted at the trial on which said nonsuit was granted; the judgment-roll; petition for writ of error; assignment of errors; order

allowing the writ of error; the writ of error; the citation; the bond, and the certificate of the clerk authenticating the record.

THEODORE A BELL and

MILTON K. YOUNG,

Attorneys for Plaintiffs.

[Endorsed]: No. 279—Civ. U. S. District Court Southern District of California, Southern Division. Mary Murray et al., Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Praecipe for Record on Writ of Error. Filed Nov. 12, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Received copy of within Praecipe the 11th day of Nov. 1915. Henry T. Gage and W. I. Gilbert, Attys. for Deft. [118]

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**[Certificate of Clerk U. S. District Court to Transcript of Record.]**

*In the District Court of the United States, in and for the Southern District of California, Southern Division.*

No. 279—CIVIL.

MARY MURRAY, and LENA MURRAY, a Minor,  
by Her Guardian *ad Litem*, MARY MURRAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
tion,

Defendant.

I. Wm. M. Van Dyke, clerk of the District Court of the United States of America, in and for the

Southern District of California, do hereby certify the foregoing one hundred and eighteen (118) type-written pages, numbered from 1 to 118, inclusive, to be a full, true and correct copy of the Judgment-roll, Bill of Exceptions, Petition for Writ of Error, Assignments of Error, Order for Writ of Error, Bond on Writ of Error, and Praecipe for Preparation of Transcript, in the above and therein entitled action, and that the same together constitute the record in said action, as specified in the Praecipe for Preparation of Transcript filed in my office on behalf of the plaintiffs in error by their attorneys of record.

I do further certify that the cost of the foregoing Transcript is \$59.70/100, the amount whereof has been paid me by [119] Mary Murray, and Lena Murray, a minor, by her guardian *ad litem* Mary Murray, plaintiffs in error.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Southern Division, this 31st day of December, in the year of our Lord, one thousand nine hundred and fifteen, and of our Independence, the one hundred and fortieth.

[Seal]

WM. M. VAN DYKE,  
Clerk of the District Court of the United States of  
America, in and for the Southern District of  
California.

By Leslie S. Colyer,  
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled  
12/31/15. [L. S. C.] [120]

[Endorsed]: No. 2726. United States Circuit Court of Appeals for the Ninth Circuit. Mary Murray and Lena Murray, a Minor, by Her Guardian *ad Litem*, Mary Murray, Plaintiffs in Error, vs. Southern Pacific Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Filed January 4, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals,  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

**[Order Enlarging Time to February 1, 1916, to File  
Record in U. S. Circuit Court of Appeals.]**

*In the United States Circuit Court of Appeals,  
Ninth Judicial Circuit.*

MARY MURRAY and LENA MURRAY, a Minor,  
by Her Guardian *ad Litem*, MARY MURRAY,

Plaintiffs in Error,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant in Error,

Good cause appearing therefor, it is hereby ordered that the time heretofore allowed said plaintiffs in error to docket said cause and file the record thereof with the clerk of the United States Circuit



Court of Appeals, for the Ninth Circuit, be, and the same is hereby enlarged and extended to and including the first day of February, 1916.

Dated at Los Angeles, California, November 29th, 1915.

BLEDSON,

Judge.

[Endorsed]: No. 2726. United States Circuit Court of Appeals, for the Ninth Circuit. Mary Murray and Lena Murray, a Minor, by her Guardian *ad Litem*, Mary Murray, Plaintiffs in Error, vs. Southern Pacific Company, a Corporation, Defendant in Error. Order Extending Time to Docket Cause and File Record. Filed Dec. 6, 1915. F. D. Monckton, Clerk. Refiled Jan. 5, 1916. F. D. Monckton, Clerk.



No. 2726.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

MARY MURRAY and LENA MURRAY, a Minor, by her Guardian *ad litem*, MARY MURRAY,

*Plaintiffs in Error,*

vs.

SOUTHERN PACIFIC COMPANY,  
a Corporation,

*Defendant in Error.*

## BRIEF OF PLAINTIFFS IN ERROR

Upon Writ of Error to the United States District Court  
of the Southern District of California,  
Southern Division.

THEODORE A. BELL,

MILTON K. YOUNG,

*Attorneys for Plaintiffs in Error.*

*Filed this.....day of January, A. D. 1916.*

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

Filed



No. 2726.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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MARY MURRAY and LENA MURRAY, a Minor, by her Guardian *ad litem*, MARY MURRAY,

*Plaintiffs in Error,*

VS.

SOUTHERN PACIFIC COMPANY,  
a Corporation,

*Defendant in Error.*

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The plaintiffs in error, Mary Murray and Lena Murray, commenced an action in the Superior Court of the County of San Luis Obispo, State of California, on August 11, 1913, for the purpose of recovering damages against the defendant in error, in the sum of fifty thousand dollars (\$50,000.00) on account of the death of Henry Murray alleged to have occurred on May 30, 1913, by reason of defendant's negligence.

The cause was thereafter removed to the United States District Court of the Southern District of California, Southern Division, and tried before the court, sitting with a jury. On May 28, 1914, the jury re-



turned a verdict in favor of the plaintiffs in the sum of five thousand dollars (\$5,000.00). Judgment was entered upon this verdict on November 30, 1914. Thereafter, the defendant in error moved for a new trial upon the grounds set forth in its notice (pp. 44 *et seq.*, Transcript of Record). On September 11, 1915, the Honorable District Judge granted the motion for a new trial, and vacated and set aside the verdict and judgment therein, before entered. The plaintiffs in error now specify as error, upon which they rely, the action of the Honorable District Judge in granting a new trial herein and setting aside and vacating said verdict and judgment.

It was subsequently stipulated between the parties that the cause should be submitted to the District Court, sitting without a jury, upon all of the evidence taken at the previous trial, for the purpose of permitting the defendant to move for a non-suit therein (pp. 59 *et seq.*, Trans.).

On September 11, 1915, the cause came on for trial, and pursuant to said stipulation, all of the testimony and evidence taken at the former trial was submitted to the court sitting without a jury, and thereupon the defendant moved for a non-suit upon the grounds set forth in defendant's motion, which appears upon page 62 of the Transcript. The motion for a non-suit was granted and judgment therein was entered in favor of the defendant, and against the plaintiffs, on September 11, 1915 (pp. 63 *et seq.*).

The plaintiffs in error now specify the following

additional errors upon which they rely, and which they intend to urge, to-wit:

1. That the court erred in granting defendant's motion for non-suit, to which ruling of the court plaintiffs by their counsel duly excepted.

2. The court erred in granting defendant's motion for non-suit because the evidence showed that the accident complained of was the result of the negligence of the defendant, and that deceased was not guilty of such contributory negligence which, as a matter of law, would preclude the plaintiffs' right to recover.

3. The court erred in granting defendant's motion for non-suit because the evidence showed that the accident complained of was the result of the negligence of the defendant.

4. The court erred in granting, making, rendering and entering a judgment of non-suit in said cause in favor of the defendant and against the plaintiffs.

These errors were assigned in the plaintiffs' assignments of error, found at page 109 of the Transcript.

The testimony of Thomas Moran, witness for the plaintiffs (pp. 69 *et seq.*, Trans.), shows that on the evening of May 30, 1913, the witness and the deceased left San Francisco for Santa Margarita, in San Luis Obispo County, on one of the regular passenger trains of the defendant corporation. They arrived at Santa Margarita at about eleven o'clock that night. While they were seated near the front of the smoking car, the brakeman, Edward Mulville,

passed through the car, and Murray said, "I think I know that fellow, and I know his father". Afterward Murray got up and spoke to the brakeman, and later on, the deceased and the brakeman talked together. Murray told the brakeman about his mission to Santa Margarita—that they were going to stop at the Santa Margarita Hotel. Neither the witness nor the deceased had ever been to Santa Margarita, and Murray asked the brakeman where the Santa Margarita Hotel was. Mulville replied, "The Santa Margarita Hotel is on the opposite side of the station; the station is on the left side and the Santa Margarita Hotel is on the right side, *and when we get there I will show you where to get off.*" As we came into Santa Margarita the whistle blew, Mulville came in from the rear of the smoker and called and beckoned to Moran and Murray and said, "This is where you fellows get off." They went to the rear end of the smoker, the brakeman leading the way, followed by Murray and the witness. The brakeman opened up the gate, the trap and the door on the front end of the coach immediately behind the smoker, and pointed out and said, "There is your hotel up there," and he left at once and went to the front end of the smoking car. Murray started down the steps as the train was slowing down—just gliding along. When Murray was on the last step, the witness glanced up and saw the light upon the ground; saw that they were going quite fast. Murray made a motion as if to step off, and alight from the train. The witness called to him, but it was too late; he was

over-balanced and went off. While Murray was standing on the steps he had a grip in his left hand and had hold of the hand-hold on the right hand side with his right hand. As Murray went to step off the steps he extended one foot and as the witness called to him, the deceased tried to recover himself, the grip swung out and his left hand swung around and "he went just as quick as that (snapping fingers)." His back was toward the engine when he fell. When the brakeman pointed out to Murray and said, "There is your hotel," the witness was immediately back of Murray. The brakeman went down the steps a ways and he had to stoop down to point to it (the hotel) when they were coming into the station. The witness saw the lights but could not distinguish to which one the brakeman was pointing. "It was so dark "that you couldn't see a thing there. It was very "dark excepting where the lights of the train—where "I was the light shone there from the smoker I came "out of and also the lights from the coach behind was "showing through, and there was a porter or some- "body standing just inside the door of that coach, "and that door was open. It was too dark to see "the ground immediately below the step. The only "reason why I knew that Murray was making a mis- "take was because I got a glimpse of the ground from "the lights of the car windows down below. There "were street lights burning, either coal oil or gas "lights, but the street was a considerable distance "from the car tracks. These lights were very dim "and did not flash on the ground, and there was no

“light immediately in front of the steps when Murray stepped off. I immediately got off the train and went back and found Murray lying alongside the tracks with an awful hole in the back of his head. Murray lived about three hours.”

The witness further testified (p. 73, Trans.) that the doors on the station side between the smoker and the first coach had not been opened before the train came to a standstill.

Murray was a large man, five feet eleven inches high, and weighed about two hundred and thirty pounds. He was thirty-eight years of age and enjoyed first-class health.

The train was a solid vestibuled train, at least vestibuled between the smoker and the first coach. There was no platform provided for passengers where Murray attempted to alight.

On cross-examination (p. 75 *et seq.*) the witness testified that the deceased did not turn his back to the engine while he was on the car. When he went out hanging on to this thing (evidently the hand-hold referred to in his direct examination), it swung him with his back to the engine. “The train was going probably twelve miles an hour. I saw Murray step off, he stepped like he thought there was another step or the ground. He heard my warning and tried to recover himself. He tried his best to recover himself, but he could not get back. The Santa Margarita Hotel is, I should judge, about between 300 and 350 feet—or perhaps 400 feet north, then west—from the line directly north—about 150



“or 200 feet. The train traveled about 350 or 400 feet after Murray stepped off. He could see out if he wasn’t trying see where he was stepping. I don’t know how that looked to him from that position, I could not say down there.”

On redirect examination, the witness testified that Murray fell *about opposite the hotel—very nearly opposite*. We were getting off opposite the hotel because that is why we were directed to get off by the brakeman. That is the reason we went off that way, was to get to the hotel. *We went out there because of the language and actions of the brakeman.*

On pages 78 and 79, Trans., the witness further testified: “As I say, we had never been in the town before, neither one of us, and the brakeman had offered to show us where to get off, and whether you want to put it for saving time, or whatever the motive was, it doesn’t make any difference to me. That was where we were to get off and go to the hotel.”

“THE COURT: The question is not whether it makes any difference to you; the question is what was your reason for getting off at that particular place?”

“A. *Because we were directed to do so by the brakeman.*

“Q. (By MR. BELL): Was that the only reason?”

“A. Yes.”

The plaintiffs Mary Murray and Lena Murray gave testimony on their own behalf, which appears

on pages 83 et seq., but this testimony related to the business earnings of the deceased, his treatment of his family, etc., and neither of these witnesses testified to any of the immediate circumstances attending the death of the deceased.

Edward Mulville, the brakeman, was called as a witness for the defendant. He testified that as the train was going into Santa Margarita, after the whistle had been sounded by the engineer, he went through the chair car and twice announced the station, came out of the chair car, opened the vestibule on the station side, went into the smoker and called out "Next station is Santa Margarita", advanced to the middle of the car, called out "Santa Margarita" again, his intention being to go to the forward part of the smoking car. Mr. Murray was standing clear of the aisle, in the center of the car, on the right-hand side, and he said "Good night, Ed". The witness said, "Here, this is where you get off; you can get out here in the morning on train 231 at 7:28". (P. 86, Trans.) The witness further testified that Murray sometime previous had asked him, "Where is the Santa Margarita Hotel?" and that the witness had replied, "The Santa Margarita Hotel is on this side and the station is on this". The brakeman further stated (P. 87, Trans.), that he said to Murray, "Now you will have to wait because we stop here a little while, say about ten minutes, and we take water and also pick up a helper." And Murray said, "Well, can't you let me over there right away?" To which the witness had replied, "No, the station is on that side, and that is the

side you will have to alight on." But later on, according to the witness, he said to Murray, "Here, I will tell you what I will do. At this station, on account of picking up a helper, I will open the trap and then when the train stops you can cross over, *and when it does stop it will be almost directly opposite the hotel.*" Further testifying, the witness declared that he went back and opened the vestibule and while he was standing there, Mr. Murray came along, that he, the brakeman, opened the vestibule but that he did not point out the hotel; that he said "Do you see the lights over there? That is Santa Margarita"; that there were three passengers to get off at that point, and that one of them was in the front car—the smoking car; that the witness looked forward and the man was reclining in his seat as though he had gone to sleep; that the witness went up to the passenger and called out "Santa Margarita"; that then he turned his head and looked back and saw Mr. Moran standing in the vestibule—not in the vestibule, but clear of the vestibule, inside of the car, close to the door; that the witness then opened the vestibule door on the station side, *and just as he got the vestibule open the train came to a standstill, and he looked back and Mr. Murray was still on the inside of the car,* and at no time was he out in the vestibule while he had any kind of conversation; that the next time he saw Moran and his friend they were standing on the end of the smoker, Murray leaning up against the open door of the smoker and Moran standing opposite; that both were inside of the car; that the witness opened the vestibule

door for the purpose of going over and getting a helper; not so much for getting off there, but for getting on after he had coupled the helper on; that his reason for opening the door (opposite the station) was because he frequently rode the tender out of the station, and "then the speed is picking up I drop off the train and catch that side", boarding the train while it is in motion.

This witness testified (p. 90, Trans.) that he did not suggest or invite Mr. Murray to alight on the right-hand side of the train; that he had advised him that the vestibule doors would be opened on the station side, and that he did open these doors on the station side.

On cross-examination (pp. 90 *et seq.*, Trans.) the witness testified that he opened the vestibule doors on the rear of the smoking car, on the station side going into Santa Margarita station before the train arrived at the station; that the vestibule doors on the station side were open before he saw Murray, and before he announced "Santa Margarita" in the smoking car; that the train was still in motion preparatory to making the station stop, going about twelve miles an hour; that afterward he opened the vestibule doors on the right-hand side toward the hotel when he saw he couldn't make the smoker; that when he opened the vestibule on the hotel side, they were not going twelve miles an hour; that he had already opened the vestibule on the station side before he opened them on the other side; that after opening the vestibule doors on the station side, he went into the smoker to announce the

station; that Murray was already standing and Moran was sitting on the left-hand side and he immediately got up and got his suitcase; that the witness went right up in the middle of the car and called again, and was talking with Mr. Murray; that he then went back again and when he saw that he couldn't make the head end because they were going too slow, he went on back; that Moran and Murray did not follow him directly; that he opened the vestibule doors on the hotel side when Murray came up there, and the witness said to him, "See the lights over there? That is Santa Margarita"; that it took about twenty seconds, or something like that, to open the vestibule doors on the hotel side; that Murray wasn't close to him—he was standing right inside of the car; that Murray didn't come out on the platform at all; that neither Murray nor Moran came out on the platform when the witness opened the doors; that the train was going about twelve miles an hour when he opened the vestibule doors on the station side.

"Q. Were you not violating Rule No. 837 when you opened those vestibule doors before the train came to a standstill?"

"A. We were all inside the station limits. I was not violating the rule. I can recite it—that trap-doors inside those vestibules must be kept closed while the train is in motion. I opened those vestibule doors on the station side while the train was going about twelve miles an hour and they were open until the train came to a standstill at the station."



The witness further testified that he was a witness before the coroner's inquest upon the body of the deceased; that he had testified that there was but one vestibule door open on the opposite side and three on the station side; that he did not open the vestibule on the opposite side of the train on the front end of the smoker.

The following portion of the testimony given by the witness before the coroner was read to him, as follows:

"Q. 'A. Yes, sir, I looked out first, it is a passing track there and I looked out to make sure. Q. Do you know, Mr. Mulville, whether there were any other of the vestibule doors on that train open, on that side of the train? A. There was one on the head end of the smoker, just as we got into Santa Margarita. I opened it to get off on that side to get the helper in.' Did you so testify? A. No sir, I did not."

"Q. I will read a little further: 'Q. In other words, merely two vestibule doors, one on the front and one on the rear end of the smoker were the only vestibule doors that were open on the side opposite from the depot at Santa Margarita? A. Yes, that is, on the engineer's side. Q. That was done at Mr. Murray's request—as a matter of accommodation to Mr. Murray? A. At his request and as a matter of accommodation.'"

(By MR. BELL): "Q. Now, I ask you, did you open that vestibule door at the rear end of that smoker, on the wrong side of the train, for your own accommodation, or for the accommodation of Henry Murray?"

"A. For my own accommodation."

"Q. Why did you testify then, at the coroner's inquest if you did testify—?"

"A. I will say candidly that I don't remember testifying to that question. I don't remember the question being asked or answering it. And furthermore, regarding the question of Mr. Kaetzel, I don't remember him asking that question. It was the coroner asked it. He says, 'Were there any other doors open on the opposite side?' I says, 'No, sir.' Then he says, 'There was but one door open on that side?' I says, 'Yes, sir.'"

(By MR. BELL) (p. 94, Trans.): "I will ask you if you didn't testify as follows:"

"Q. 'The vestibule doors of the rear cars? A. Yes, sir, that was done after we left the west switch. Q. You do that as you are coming into the station? A. Yes, I was doing it as we—were coming into Santa Margarita. When I met Mr. Murray in the smoker, I was pressed for time to get to the head end and I went right back and done it, and the last I see of him he was standing in the door of the smoker at the rear end, and I had to squeeze myself by, he was a man of large proportions and I was going to say something in a joshing manner, but I left him there, I didn't have time to talk. Q. The right-of-way was clear? A. Yes, sir, I looked out at first, it is a passing track there and I looked out to make sure.'"

(MR. BELL): "Q. Was there a passing track there where Mr. Murray got off?"

"A. There is a siding there on that side; the siding  
 "is on that side. I looked out there to make sure that  
 "there was no train in there because after telling him  
 "the conditions that I was working under there, I  
 "told him he could get off—after telling him he  
 "would have to get off at the station side, that he  
 "could cross over, if there was a train there I could  
 "have told him there was one there, and he would  
 "have to wait anyway. I looked out to see if the  
 "track was clear, on my own account \* \* \* I  
 "looked out partly for Mr. Murray. If there was a  
 "train there I could have told him. I told him when  
 "the train stopped the rear end of the smoking car  
 "would be almost directly in front of the hotel. \* \* \*  
 "I did not tell him anything about crossing over the  
 "right-of-way; I said he could go over right away  
 "without having to wait. \* \* \* I didn't know  
 "when I left him that he was going to get off on  
 "that side; to all intents and purposes he looked as  
 "if he was going to get off on the station side. \* \* \*  
 "I told him that after the train came to a stop, he  
 "could cross over from one side of the train to the  
 "other through the vestibule. I did not tell him that  
 "I had to open up that vestibule to get back onto the  
 "train. I says, 'Here, on account of picking up a  
 "helper I will open the vestibule on that side.' I  
 "told him that just as a matter of accommodation, so  
 "that while we were standing there he could cross  
 "over and go to the hotel."

On redirect examination, the witness testified as follows (p. 100, Trans.):

"Murray was picked up about 300 feet from where the car stopped—about four cars. Murray was perfectly sober. When the vestibule door on the station side was opened, the train was going about twelve miles an hour; when the vestibule on the opposite side was opened about seven or eight miles."

A. B. SPEAR, the conductor, was called as a witness for the plaintiffs in rebuttal, and testified as follows (pp. 100 *et seq.*, Trans.):

"I do not recall having had any conversation with the brakeman as to why he had opened the vestibule door on the opposite side of the train."

(At the request of Mr. Bell, witness examines the transcript of testimony given by him before the coroner at the inquest.)

"Q. Let me read it to you now: 'Q. I would just like to ask you what the regulations or rules of the company are as regards opening the vestibule doors as applying to the Santa Margarita station. A. It is customary for passengers to detrain at the station side there as other places, there is a positive injunction against opening the vestibule doors opposite the station on double track.' You so testified, did you?"

"A. Yes."

"Q. And that is correct, the matter you testified to?"

"A. Yes."

"Q. 'Is there a double track at Santa Margarita?'"

"A. 'No, perfectly clear, that is, no side track close to the track there.' Q. Is that a fact?"

"A. Yes, sir."

“Q. ‘Q. Then what would be your understanding  
 “ that this positive rule forbidding the opening of ves-  
 “ tible doors on a side opposite the depot would ap-  
 “ ply to Santa Margarita? A. We, no, I don’t think  
 “ so; in the case of this man, *as I hear the brakeman*  
 “ *say, it was an accommodation for the passenger who*  
 “ *wished to go to the hotel*, we were delayed there for  
 “ five minutes always and sometimes longer, and he  
 “ was expected to cross over there, or leave from that  
 “ side of the train after the train had stopped.’ Now,  
 “ does that refresh your recollection?”

“A. Well, I suppose I testified to that.”

“Q. Did you hear the brakeman say why he had  
 “ opened that vestibule door?”

“A. Well, that particular one being near or op-  
 “ posite the hotel would allow the passenger to cross  
 “ over after the train had stopped, I think, as I under-  
 “ stood it at that time. This was done to allow him to  
 “ cross over, but not to get off. He could get off at  
 “ the station after the train had stopped, and then go  
 “ on back through two vestibule doors and across the  
 “ platform and then over to the hotel. He would  
 “ have either to go around the end of the train to the  
 “ hotel or while the train was standing still he could  
 “ cross through. I gave no one permission to cross  
 “ over that train while it was in motion, or to alight.”

“Q. I will ask you if you didn’t testify as follows:  
 “ Q. ‘Who gives the brakeman instructions regarding  
 “ which side of the train they shall open the vestibule  
 “ doors? A. There are no instructions. Q. There  
 “ is a regular set of rules governing these things?”



“A. There is a custom and rules covering that.”

“Q. They are supposed to be familiar with them?

“A. Yes. ‘Q. Would you understand, then, when  
“ Mr. Mulville opened this door, the vestibule door on  
“ the side of the train opposite from the depot to per-  
“ mit this passenger to alight on that side, that he was  
“ violating a rule of the company?’ I call your atten-  
“ tion to that question asked you by the coroner. ‘A.  
“ Well, if the passenger was not to alight until the  
“ train had come to a stop I think it would be per-  
“ fectly safe.’ Did you so testify?”

“A. I suppose I did. A conductor is required to  
“ give no instructions in a case as to how those things  
“ are to be done.”

“Q. I asked you if you didn’t testify as follows, and  
“ if that doesn’t correctly state the fact. ‘Q. Would  
“ you understand then when Mr. Mulville opened this  
“ door, the vestibule door on the side of the train op-  
“ posite from the depot to permit this passenger to  
“ alight on that side, that he was violating a rule of  
“ the company? A. Well, if the passenger was not to  
“ alight until the train had come to a stop, I think it  
“ would be perfectly safe.’”

“Q. You so testified, did you not?”

“A. Yes, sir, I guess I did, and I intended to tes-  
“ tify to the truth when I so testified.”

It was upon this state of the evidence that the motion for a non-suit was granted. It has been frequently said that a motion for a non-suit is in the nature of a demurrer to the evidence. The same rule

applies upon such a motion, to the court, sitting without a jury, as in a case where the evidence is to be weighed and construed by a jury. Can it be said upon a perusal of the testimony in this case that there was not sufficient evidence to require its submission to a jury?

As hereinbefore pointed out, a non-suit can be granted only when it can be said, as a matter of law, that there is no substantial evidence to support the plaintiffs' case, that only one inference can be drawn from the evidence, and that resolving all conflicts in favor of the plaintiffs and resolving every doubt against the defendant, the cause should not be heard and determined by a jury.

There is nothing in the testimony of the witness Moran to discredit him, and even had there been any inconsistencies in his testimony, these inconsistencies could not be considered upon the motion for a non-suit; and further, if it appeared that the witness Mulville gave testimony in contradiction of the evidence given by Moran, this could not be considered upon such a motion, but would have to be submitted to a jury for the purpose of permitting the jurors to determine which of the witnesses should be given credence.

The record discloses that the deceased was unfamiliar with the station and town of Santa Margarita. He reached there at about eleven o'clock on a very dark night. The brakeman volunteered to open the vestibule doors on the side of the train opposite from the station where there were neither lights nor platform for the accommodation and protection of the

passengers. As the train approached the station, traveling at the rate of about seven or eight miles per hour, according to the statement of the brakeman and the allegation of the answer in this case, the brakeman led the way to the vestibule between the smoking car and the first coach. He proceeded to open the trap, stood upon one of the steps and bending over pointed out to Murray, who was immediately behind him and carrying a suitcase, certain lights, saying, "There is your hotel up there." He had previously told Murray that they would stop *opposite the hotel*. The evidence shows that Murray's body was found just about opposite the hotel. It is only fair to assume, and certainly a jury would be entitled to draw this inference, from the testimony in the case, that Murray, having been shown the hotel by the brakeman, and having been told that the train would stop opposite the hotel, and being about opposite the hotel when he attempted to alight, actually believed that the train had come to a standstill when he descended the steps. It was a very dark night; there was no light on the ground immediately below the car steps. The witness Moran testified that he discovered that the train was still in motion only by observing the bar of light shining from the car windows out upon the ground some distance beyond the train, and it is only fair to assume, at least this was another inference which a jury had the right to draw from the evidence, that Murray, in descending the steps, with a suitcase in his left hand, and holding on with his right hand, was looking down at the steps which he was descending; this is what a man of

ordinary prudence would do under the circumstances, and therefore if Murray was looking down at the steps, he would not have seen the light shining out upon the ground beyond, and would therefore not have had the same means of knowing that the train was in motion, that his companion had. The only conclusion that could be drawn from the evidence was, that Murray was invited by the words and actions of the brakeman to attempt to alight at the time and place that he did, or, at least, invited to descend the steps preparatory to his getting off. The evidence is not clear as to whether he stepped off the train or fell off, whether he reached the lower step and lost his balance by reason of the train's motion, or whether, hearing the warning from his friend, at the instant of attempting to step off the train, he lost his balance and fell to the ground. These were questions of fact to be determined by a jury like any other facts in doubt or in dispute. The honorable trial court would not be justified in taking these questions of fact, from which different inferences might be drawn, out of the hands of a jury, because it could not be said that only one inference, *i. e.*, that of contributory negligence, could be drawn from the testimony.

The witness Mulville discredited himself, not only by testifying differently from what he had testified to at the coroner's inquest, but according to his testimony, the train was at a standstill before Murray attempted to alight. On page 88 of the transcript, this witness states "When I went and opened the vestibule door on the station side, and just as I got the vesti-

"bule opened, the train came to a standstill, and I *looked back and Mr. Murray was still on the inside of the car.*" The testimony of this witness also shows that he was violating rule No. 837 of the defendant corporation which provides that trap-doors inside the vestibule must be kept closed while the train is in motion. At the coroner's inquest, this witness testified that he had opened the door on the *front end* of the smoker on the side opposite from the station; while at the trial of this cause, he gave as an excuse for opening the vestibule doors, where Murray alighted, *that he did not have time to make the front end of the smoker.* If the latter statement be true then the train was going so *slowly* that he did not have time to go to the front end of the smoker, open the door on the opposite side from the station, but took the shorter route to the vestibule doors at the rear of the smoker. The jury undoubtedly gave very little credence to Mulville's testimony. He *denied* that he had opened the door for the purpose of letting Murray off on that side of the train, while at the coroner's inquest he stated that he *opened the door for Murray's accommodation.* Conductor Spear also testified that he heard the brakeman say that it was an accommodation for a passenger that caused him to open the vestibule door on the opposite side of the station.

In passing upon the correctness of the judgment on non-suit in this case, this court may consider only the evidence submitted by plaintiff. The whole and



every part of it is deemed to be true. The simple question is, does it sustain the cause of action?

The honorable trial judge could have granted the non-suit only upon the theory (1) that the plaintiff had failed to prove any negligence upon the part of the defendant, or (2) if there was proof of defendant's negligence that the deceased was guilty of such contributory negligence as would bar recovery by his surviving wife and child. The question of defendant's negligence and the alleged contributory negligence of the deceased are so intimately connected that both may be discussed together, not only as to the facts given in evidence, but as well as to the well-defined principles of law applicable thereto.

The statutory law of the State of California governing non-suits should be followed in this case (*Connecticut Fire Ins. Co. vs. Manning*, C. C. A. 177 Fed. 893); but it has been said that the federal courts are not bound by the decisions of the state courts with respect to negligence of common carriers (*Myrick vs. Michigan Central R. Co.*, 107 U. S. 1021), or with respect to contributory negligence (*Indiana St. A. R. Co. vs. Horst*, 93 U. S. 291; *No. Pac. R. Co. vs. Mares*, 123 U. S. 710). But inasmuch as the decisions of the state and federal courts are in practical harmony upon the subjects of non-suits, negligence of carriers and contributory negligence upon the part of passengers attempting to alight from moving trains, we may resort to both state and federal decisions for a solution of the legal questions arising herein:

"An action may be dismissed, or a judgment of non-suit entered, in the following cases:

"(5) By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury." Sec. 581, C. C. P.

"A motion for a non-suit may not be granted if there be any evidence tending to sustain the plaintiff's cause of action."

*Donovan vs. Kemper*, 26 Cal. App. 352, 146 Pac. 1044.

The motion for non-suit admits the truth of plaintiff's evidence and every inference of fact that can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against the defendant.

*O'Connor vs. Mennie*, (Cal. Sup. Ct.), 146 Pac. 674;

*Hoff vs. L. A. etc. Co.*, 158 Cal. 596.

On a motion for a non-suit every favorable inference fairly deducible, and every favorable presumption fairly arising from the evidence produced, must be considered as facts in favor of the plaintiffs. Where the evidence is fairly susceptible of two constructions, or if any of the several inferences may reasonably be made, the court must take the view most favorable to the plaintiffs. All the evidence in favor of the plaintiffs must be taken as true and if contradictory evidence has been given, it must be disregarded, if there is any substantial evidence tending to prove all the facts necessary to sustain the

cause of action, they are entitled to have the case go to the jury for a verdict on the merits.

*Estate of Arnold*, 147 Cal. 583;  
*Boyle vs. Coast Improvement Co.*, Cal. App.  
 151 Pac. 25.

If but one conclusion can reasonably be reached from the evidence, it is a question of law for the court, but if one sensible and impartial man might decide that the plaintiff had exercised ordinary care, and another equally sensible and impartial man that he had not exercised such care, it must be left to the jury.

*Jacobson vs. Oakland Meat & Packing Co.*,  
 161 Cal. 425 (Ann. Cas. 1913b, 1194; 119  
 Pac 653);  
*Herbert vs. S. P. Co.*, 121 Cal. 227.

If there is some evidence introduced on behalf of the plaintiff, showing that the deceased was not guilty of that degree of contributory negligence to which the cause of his injury might directly or proximately be imputed, then the question presented is one of fact and for the solution of the jury.

*Payne vs. Oakland Traction Co.*, 15 Cal. App.  
 127, 113 Pac. 1074.

To the same effect are:

*Burr vs. U. R. R. of S. F.*, 163 Cal. 663, 126  
 Pac. 873;  
*Christensen Lumber Co. vs. Buckley*, 17 Cal.  
 App. 37, 118 Pac. 466;

*Mitchell vs. Brown*, 18 Cal. App. 117, 122 Pac. 426;  
*Davis vs. Crump*, 162 Cal. 513;  
*Lawyer vs. L. A. Pac. Co.*, 161 Cal. 53;  
*Zibbell vs. S. P. Co.*, 160 Cal. 237, 38 Cyc. 1558.

The rule has been declared with great clearness by Mr. Justice Henshaw in *Zibbell vs. Southern Pacific Co.*, 160 Cal. 237:

“Whether or not a plaintiff has been guilty of contributory negligence is similar to the question whether or not the evidence in a criminal case is sufficient to sustain a verdict of guilty. It is usually a question of fact. It is a question of law only when the evidence is of such a character that it will support no other legitimate inference than that in the one case the plaintiff was guilty of contributory negligence; in the other case, that there was not sufficient evidence to sustain the verdict. But even in such cases, while the question is said, and properly said, to be one of law, it is never a question of pure law. The real decision of the question by the court is a decision of fact. When the evidence is such that the court is impelled to say that it is not in conflict on the facts, *and that from those facts reasonable men can draw but one inference*, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury, then, and only then, does the law step in and forbid plaintiff a recovery. It must follow, therefore, that cases from other jurisdictions can be of value to such a consideration only when one may be found which parallels in all its essential features the case under consideration. This, in the nature of things, can never, or rarely, happen. And, even if such a case be found, it cannot in any true

sense be said to settle the law. \* \* \* The law of this State is so well settled that it may be briefly summarized. Contributory negligence is a defense, the burden of proving which rests upon defendant. (*Schneider v. Market St. Ry. Co.*, 134 Cal. 482; *Hutson v. Southern California Ry. Co.*, 150 Cal. 701.) \* \* \* It is incumbent upon the defendant to establish the existence of plaintiff's contributing negligence. Again, the question of whether or not a plaintiff has been guilty of contributory negligence is usually one of fact for the jury's verdict."

Therefore, applying the above rules to this case, it cannot possibly be said that contributory negligence exists here as a matter of law. It is extremely unreasonable to declare that only one inference and one conclusion is deducible from the evidence in this case. Considering each and every circumstance and event leading up to the accident, will it be said that the deceased was reckless or careless, disregarded his own safety, knowingly and intentionally placed himself in a position of danger, violated the natural principle of self-preservation, and failed, beyond all question of doubt, to conduct himself like an ordinarily prudent man would under like circumstances? Albeit, whether this can be said or not, the plaintiffs in this case had the right to have the question submitted to the jury, there to be considered and determined by them.

It is pointed out in the above decision that in the consideration of questions of this sort, cases from other jurisdictions can seldom be of any value. They can



aid "only when one may be found which parallels in  
 " all its essential features the case under consideration.  
 " This, in the nature of things, can never, or rarely,  
 " happen. And even if such a case be found, it can-  
 " not in any true sense be said to settle the law. Its  
 " value will come from the persuasive force of its  
 " reasoning—not upon the law—but upon the facts  
 " to which the law forbidding the recovery has been  
 " applied."

*Zibbell vs. Southern Pacific Co., supra.*

We now pass to the questions presented by the evidence in the case.

A carrier of passengers must exercise the highest degree of human care, prudence and foresight, and is liable for the slightest negligence in itself or servants.

*Roberts vs. R. R. Co.*, 14 Cal. App. 180, 6  
 Cyc. 592;  
*Trumbull vs. Erickson*, 97 Fed. 891, 38 C. C. A.  
 536.

Proof of slight neglect will, it is held, render the carrier liable for injury to a passenger.

*Seymore vs. Chicago R. Co.*, 3 Biss (U. S.) 43,  
 21, Fed. Cas. 685.

Where a carrier himself creates the danger, he is bound to use adequate precaution for the safety of the passenger against such danger.

*Brockway vs. Loscala*, 1 Edm. Sel. Cas. (N.  
 Y.) 135;  
*Klein vs. Jewett*, 26 N. Y. Eq. 474.

The carrier is liable for the acts of its servants.

*Fisher vs. Fuse Co.*, 12 Cal. App. 739.

Where there is a conjoint continuous negligence, it is a question for the jury.

*Lininger vs. S. F. etc. R. R. Co.*, 18 Cal. App. 411.

Even if there be negligence on the part of the passenger, yet if at the time the injury was committed, the carrier might have avoided the resulting injury by reasonable care and prudence when aware of the peril, the carrier is liable.

*Wilson vs. Traction Co.*, 10 Cal. App. 103.

A carrier is required to exercise the highest degree of care to secure the safety of its passengers, and is responsible for the slightest negligence, if any injury is caused thereby; and the carrier's duty is not ended by carrying a passenger safely from one point to another. But said carrier must set the passenger down safely, if, in the exercise of the utmost care, it can be done.

*Evansville etc. R. Co. vs. Athon*, (Ind.) 51 Am. St. Rep. 303.

It is negligence for an employe of a railroad to induce a passenger to leave a train while in motion.

*Evansville etc. R. Co. vs. Athon*, *supra*;  
*Jones vs. Chicago etc. R. Co.*, 42 Minn. 183,  
 43 N. W. 1114;

*Filer vs. N. Y. Central R. Co.*, (N. Y.) 10 Am. St. Rep. 327;  
*Eddy et al. vs. Wallace*, (C. C. A.) 49 Fed. 801;  
*Lake Erie etc. R. Co. vs. Hoffman*, (Ind.) 97 N. E. 434;  
*Louisville etc. Co. vs. Holsapple*, 38 N. E. 1107;  
*Atchison etc. R. R. Co. vs. Hughes*, (Kan.) 40 Pac. 919;  
*Bucher vs. N. Y. etc. R. R. Co.*, 98 N. Y. 128.

"It may be stated as a general proposition that when the conductor or brakeman, on the train, who is presumed to be familiar with the danger incident to getting on or off slowly moving trains, directs a passenger, who may be ignorant of such danger, to get off the train, although in motion, such passenger will ordinarily naturally presume that the conductor or brakeman knows that it is entirely safe, or he would not give the direction: *Filer v. New York Cent. R. R. Co.*, 49 N. Y. 47; 10 Am. Rep. 327; *Cincinnati etc. R. R. Co., v. Carper*, 112 Ind. 26, 2 Am. St. Rep. 144; *Louisville etc. R. R. Co. v. Kelly*, 92 Ind. 371, 47 Am. Rep. 149; *Kentucky etc. Bridge Co. v. Quinkert*, 2 Ind. App. 244.

"The question whether such act is of itself contributory negligence depends in each case on the surrounding circumstances: *Terre Haute etc. R. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168."

*Evansville etc. R. R. Co. v. Athon*, 6 Ind. App. 295, 51 Am. St. Rep. 306.

It is not negligence *per se* to alight from a moving train.

*Carr vs. Eel River etc. R. R. Co.*, 98 Cal. 366;  
*Penn. R. R. Co. vs. Marion* (Ind.), 18 Am. St. Rep. 330;

*Harris vs. Pittsburg etc. Co.* (Ind.), 79 N. E. 407;  
*Raub vs. Ry. Co.*, 103 Cal. 476;  
*Finkedy vs. Omnibus etc. Co.*, 114 Cal. 31;  
*Chicago etc. Co. vs. Lampman*, (Wyo.) 104 Pac. 533;  
*Oklahoma Ry. Co. vs. Boles*, 120 Pac. 1104;  
*Lake Erie Ry. Co. vs. Hoffman*, (Ind.) 97 N. E. 434;  
*Atchison etc. R. R. Co. vs. Hughes*, (Kan.) 40 Pac. 919.

It is not negligence *per se* for a passenger to alight on the non-platform side of the train.

*McQuilken vs. C. P. R. R. Co.*, 64 Cal. 463;  
*Owen vs. Washington etc. R. Co.*, (Wash.) 69 Pac. 757;  
*Murphy vs. S. P. Co.*, 2 Cald. 275;  
*Ky. & I. Bridge Co. vs. McKinney*, (Ind.) 36 N. E. 448.

Whether deceased stepped from the train or fell by reason of the jarring or jerking of the train was a question of fact for the jury.

*Chicago etc. R. Co. vs. Lampmen*, (Wyo.) 104 Pac. 533.

Even if the brakeman warned the deceased while on the step, this was not sufficient to conclusively establish negligence of the deceased, and it was a question of fact for the jury to decide as to whether or not the warning was in time to be of any service to him.

*Louisville etc. Co. vs. Bean*, (Ind.) 36 N. E. 443.

The principal questions in this case, whether the defendant sufficiently induced or invited deceased to leave the train, whether the deceased knew that the train was moving when he attempted to alight, whether under the circumstances he believed that the final destination had been reached, whether the defendant was negligent in failing to properly care for the passenger by notifying him of the danger in alighting at that particular time, were questions for the jury.

“Before reaching it (the station) the brakeman announced the station; several passengers arose to leave; the plaintiff then rose from her seat near the center of the car, walked out upon the platform, took hold of the rail, stepped down one step, and was in the act of stepping to the second, when the train with a violent jerk started back, throwing her down and off, and she was injured. It was held, in an action to recover damages, that it was a question for the jury, whether, in the exercise of reasonable care and prudence, the defendant should not have given notice to passengers desiring to alight at the station *that the train had not come to a final stop*, but would back up; and that the plaintiff was justified under the circumstances, *in supposing she had reached her destination*, and in attempting to leave the car; at least, that the question of contributory negligence on her part was proper for the jury. \* \* \* But the fact that the train overshot the station, rendering it necessary, after it came to a standstill, to start it back to the usual stopping-place, in connection with the other circumstances, made it a question for the jury, whether, in the exercise of reasonable care and prudence, the defendant should not have given



notice to passengers desiring to alight at the station that the train had not come to a final stop, and that it would back up."

*Tabor vs. Delaware etc. R. R. Co.*, 71 N. Y. 489, 7 Am. St. 833.

We have assigned as error the order of the trial court granting a new trial after the rendering by the jury of a verdict for plaintiff, and the entry of the judgment thereon. The same argument which we urge against the error in granting the non-suit applies to the error in granting the new trial. We contend that the evidence *in toto* is sufficient as to defendant's negligence to allow it to be passed upon by the jury; that it cannot be said that it is of such a character that it permits of but one conclusion on the questions of defendant's negligence and deceased's contributory negligence.

For these reasons, we earnestly maintain that the judgment upon the non-suit should be reversed, and that the judgment after the trial and upon the verdict of the jury should be affirmed.

Respectfully submitted,

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No. 7726

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IN THE  
United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT.

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Mary Murray and Lena Murray, a  
Minor, by her Guardian ad litem,  
Mary Murray,

*Plaintiffs in Error,*

*vs.*

Southern Pacific Company, a cor-  
poration,

*Defendant in Error.*

Filed

FEB 3 - 1916

F. D. Monckton,  
Clerk

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BRIEF OF DEFENDANT IN ERROR.

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**BRIEF OF DEFENDANT IN ERROR.**

The statement of the plaintiffs in error of the testimony offered at the trial of the cause is practically correct, and almost complete. As stated by counsel for plaintiffs in error, there is but one real question to be determined; that is whether or not the actions of the deceased at the time immediately preceding the accident, were such as to constitute contributory negligence as matter of law. If so, then the action of the trial court in sustaining a motion for non-suit should be upheld, otherwise the case should be submitted to a jury.

An examination of the record will develop that there was but one witness present at the time the accident

occurred. He was in a position to see what transpired. He was the plaintiff's witness and his version of the affair is of necessity the appellants' version, and it was upon the circumstances as detailed by him that the learned trial judge based his action in sustaining the appellee's motion for a non-suit. We feel, therefore, that the circumstances of the unfortunate accident as detailed by this witness on cross-examination may be properly set out in full for the guidance of the court in the application of the authorities which are then to follow.

Bearing in mind the fact that this living witness was not in a position to see or understand the dangers that confronted one in attempting to alight, with the same vision of completeness as the deceased, we quote his testimony as follows:

"We left San Francisco at eight o'clock in the evening. The accident happened twenty minutes after eleven. About an hour before we reached Santa Margarita, I don't know whether Murray asked the brakeman or whether he volunteered the information in regard to where the Hotel Santa Margarita was situated. The brakeman told Murray. He said it was on the opposite side of the track from the depot. He advised Mr. Murray at that time that the hotel was on the opposite side of the railroad from the station. Before we reached the station he pointed out the hotel on the opposite side of the station, saying, 'There is your hotel.' Then he turned and walked away after he opened the vestibule door. He didn't say anything about getting off, which side we should get off on, while we were on the platform. Just opened the door and walked away. Mr. Murray then descended the steps with his grip in his left hand. He had told of the



hand-hold with his right hand. He did not turn his back to the engine while he was on the car. When he went out hanging onto this thing it swung with him with his back to the engine. The train was going perhaps twelve miles an hour, perhaps more; I could not tell. I happened to look out. I was standing back from the steps and I had to glance up that way to where the light was cast out of the car window, and there I saw the ground. I saw Mr. Murray step off; he stepped like he thought there was another step to the ground. I think the train was going 12 miles an hour, fully that. He heard my warning and tried to recover himself. I was standing behind him. As soon as I saw the rapidity with which the train was moving, I saw it was dangerous, and I knew it wouldn't do for him to attempt to alight and I called to him. He tried his best to recover himself, but he could not get back. The train ran about seven coaches from where he got off. I do not know anything when they opened that vestibule door; the one on the station side. It was not open when I was talking with Murray at the top of the stairs. We had not then reached the station yet. I do not know whether it was open when we reached the station. I have not been to Santa Margarita since the date of the accident. The Santa Margarita Hotel is, I should judge, about between 300 and 350 feet—or perhaps 400 feet north, then west—from the line directly north—about 150 or 200 feet. The train traveled about 350 to 400 feet after Murray stepped off. He could see out, if he wasn't trying to see where he was stepping. I don't know how that looked to him from that position; I could not say down here." [Tr. of record, pp. 75-76.]

Thus it will be seen that the "invitation" discussed by counsel for plaintiffs in error consisted merely in a piece of friendly information given to the deceased as

to the location of his hotel, and that at the time the deceased attempted to alight, as shown by the record, it was with a realization that he was assuming a dangerous position in alighting at a point other than that designated by the defendant company in the erection of its station-house.

As was said by the Supreme Court in the case of *Craven v. Central Pacific Ry. Co.*, 77 Cal. 347:

*“Did the plaintiff at the very time of the accident negligently jump off the train while it was moving? If she did not, the verdict must be for the plaintiff. If she did, then there can be no doubt that her negligence contributed proximately to the injury. It was the very thing then and there directly causing it.”*

In Schouler on Bailments and Carriers (3rd Ed., Sec. 662), it is said:

“Thus a railway passenger is not justified in jumping from the train while it is in motion, even though the carrier was negligent, whether in carrying him past the station, or in starting before he had due opportunity to land.”

In *Holyman v. Kanawha & Michigan R. R. Co.*, reported in Vol. 17 American & English Annotated Cases, it is said:

“The general rule is that passengers getting off moving trains are chargeable with contributory negligence and cannot recover for injuries received therefrom.

“The act of getting on or off a moving train is evidence of contributory negligence, and imposes upon one who is injured in doing so the burden of

proving that the peculiar circumstances of the case justified him in such course.”

Also in 1 Ann. Cas. 779, the court said:

“Even where the train is moving slowly, the act of alighting therefrom may constitute contributory negligence as a matter of law if the person so alighting is in a weak physical condition or of advanced age.”

In the case of *East Tennessee etc. Ry. Co. v. Massengill*, 15 Lea. (Tenn.) 328, it is said:

“The general rule is that passengers injured while getting on or off moving trains cannot recover for injuries. The act of getting on or off a moving train is evidence of contributory negligence, and imposes upon one who is injured in doing so the burden of proving that the peculiar circumstances of the case justified him in such course.”

In the case of *Illinois Central Ry. Co. v. Davidson*, 64 Fed. 301, 24 U. S. App. 354 and 12 C. C. A. 18, it is said:

“A passenger who unnecessarily and negligently exposes himself to danger while alighting from a train is guilty of contributory negligence, even though he does not know of the danger to which he is exposed.”

In the case of *Raben v. Cen. Iowa R. Co.*, 73 Ia. 581, the court said:

“This instruction was erroneous in the particular that it asserts that ‘such railroad company is bound to exercise the strictest vigilance in carrying passengers to their destination, and in setting them

down safely thereat.' This in its latter portion states the law too strongly in favor of the plaintiff. All the duty the law imposes upon a conductor, acting as the agent of a corporation, in order to comply with the obligations of the carrier to a passenger, is to carry him safely to his point of destination, announce the arrival of the train at the station, and give him a reasonable opportunity to leave the cars. When this is done, the duty of the conductor ceases. *Sevier v. Vicksburg etc. R. Co.*, 61 Miss. 8, Am. & Eng. R. Cas. 245; *Straus v. Kansas City etc. R. Co.*, 75 Mo. 185."

In Vol. 17, American & English Ann. Cas. (in discussing the case of *Holyman v. Kanawha & Mich. Ry. Co.*, *supra*), on page 1154 the author uses this language:

"Question of Law."

"In some jurisdictions it has been held that it is negligence *per se* to alight from a moving train, and that such negligence bars a recovery for the injuries received thereby, although the carrier was negligent in the first place. *Joyce v. Los Angeles R. Co.*, 147 Cal. 274, 82 Pac. 204; *Newlin v. Iowa Cent. R. Co.*, 127 Ia. 654, 103 N. W. 999; *Owens v. Atlantic Coast Line R. Co.*, 147 N. C. 357, 61 S. E. 198, approving *Morrow v. Atlanta etc. Air Line R. Co.*, 134 N. C. 92, 46 S. E. 12. See also *Mearns v. Central R. Co.*, 139 Fed. 543, 71 C. C. A. 331; *Whitfield v. Atlantic Coast Line R. Co.*, 147 N. C. 236, 60 S. E. 1126; *Boulfrois v. United Traction Co.*, 210 Pa. St. 263, 2 Ann. Cas. 938, 59 Atl. 1007, 105 Am. St. Rep. 809."

Thus it has been held that a person who is injured in leaping from a train moving at the rate of 14 or 15 miles an hour cannot recover for his injuries.

Woolry v. Louisville Ry. Co., 107 Ind. 381.

These are only a few general authorities in which the rule has been well expressed that an adult person, even though suggestions and advice have been given him by members of the train crew, in attempting to alight from a moving train, assumes the risk, by virtue of being compelled to exercise his own judgment as a free agent.

In *Whitlock v. Comer*, 57 Fed. 565, it is said in regard to passengers stepping off moving trains:

“An adult male passenger, waiting for a railroad train to come to a full stop before attempting to alight, who, when directed and required by the conductor, jumps from the moving train, when it is obvious that he can not do so with safety, and thereby sustains injuries, can not recover damages for such injuries.”

In *S. & N. A. R. Co. v. Schaufler*, 75 Ala. 136, the Supreme Court of that state says:

“Where an adult passenger leaves a moving train under the advice or direction of the conductor, he can not recover for injuries received as a result where such advice or direction is so opposed to common prudence as to make it obvious act of recklessness or folly.”

In *Saint Louis etc. Ry. Co. v. Rosenberry*, 45 Ark. 256, the Supreme Court of Arkansas says:

“A passenger boarded a freight train to go to a station at which the train did not stop. The con-



ductor was angry and abusive and ordered the passenger to jump off when the train reached the station. He made no threats to put him off, however, and there was no reason to suppose that this would be done. The passenger jumped off while the train was going 10 or 12 miles an hour and sustained injuries. HELD, that his conduct precluded his recovering damages from the company."

To the same effect is the decision of the Supreme Court of Georgia, reported in 92 Ga. 388, 17 S. E. 949:

"In an action against a railroad company for injuries to plaintiff's daughter, 17 years of age, caused by jumping from a train while in motion, plaintiff alleged that she was ordered so to do by the conductor, who refused to stop the train at that point, for which she had bought a ticket. HELD, that there could be no recovery though the conductor did give such order if the danger of obeying was so manifest that a person of her age in the exercise of ordinary discretion would not have done so."

The rule in Indiana is to the same effect, as is shown by the case of *Jeffersonville R. Co. v. Swift*, 26 Ind. 459:

"Where a passenger voluntarily leaves a train of cars while in motion, it is insufficient to charge the company that the conductor advised him that he could safely jump from the train."

"A passenger who was asleep when his station was reached, being told by the conductor shortly after passing it that if he wanted to get off to get off quickly, took his stand on the steps ready to get off if the train stopped and while standing there was thrown off by a sudden jerk in taking up the

‘slack.’ HELD, that he was guilty of contributory negligence.”

Lindsey v. Chicago etc. Ry. Company, 737.

“The act of a passenger in jumping from a train running 20 miles an hour is such a reckless act that it will prevent him from recovering of the carrier for the injuries sustained, though the conductor may have advised him to jump.”

C. & O. Ry. Co. v. Gregson, 12 Ky. L. R. 604.

“The calling of a station and opening and fastening back of the car door by its brakeman was NOT an invitation to plaintiff, a passenger, to step off a moving train.”

England v. B. & M. Ry. Co., 153 Mass. 490,  
27 N. E. 1.

“A passenger injured by deliberately, and for his own convenience, jumping off a moving train, can not recover because the conductor told him when to jump and slackened the speed of the train a little, refusing to stop and not being obliged to stop.”

Bardwell v. Mobile & Ohio Ry. Co., 63 Mill.  
574, 56 A. R. 842.

Giving the theory of plaintiffs in error the benefit of every inference which might be drawn from the testimony, if they are to be bound by the law as laid down in the case of Bardwell v. Mobile and Ohio Ry. Co., last above quoted, certainly in view of their own testimony that the deceased was alighting on the opposite side from the station, inferentially for the reason that his hotel was located on that side, then the action of the court would be warranted by the authorities.

“A passenger INCUMBERED WITH HANDBAGGAGE, who alighted from a train moving SIX miles an hour on a dark night before it had reached the platform of the station where he was to get off and with which he was familiar and with no reason to believe the train would not stop, WAS NEGLIGENT.”

S. & N. A. v. Schaufler, 75 Ala. 136.

“It is gross negligence in a passenger on a street railway to jump from a car when it is going at a speed of 20 miles an hour, whether he knows or does not know that the car is going so fast.”

In connection with the question of speed, it will be remembered that in this case the appellants' testimony places the rate of speed at which the train was traveling at much less than the speed of the train in the case above quoted from.

Masterson v. Macon City R. Co., 88 Ga. 436,  
14 S. E. 591.

“Where a passenger after the conductor called his station gets off the train several hundred yards before it reaches the depot and while running at a high rate of speed, he is guilty of such negligence as precludes a recovery for such injuries received.”

L. & N. v. Depp, 33 S. W. (Ky.) 417.

“The belief that the train from which plaintiff stepped while in motion was standing still DOES NOT rebut the presumption of contributory negligence in the absence of evidence showing that such belief was unreasonable.”

C. B. & Q. Ry. Co. v. Landauer, 39 Neb. 803,  
58 Mo. 434.

“An adult who knowingly and unnecessarily steps from a moving train, is GUILTY OF CONTRIBUTORY NEGLIGENCE as a matter of LAW.”

Olson v. Milwaukee & St. Paul Ry. Co., 102 N. W. (Minn.) 449;

Lynch v. Interurban St. Ry. Co., 88 N. Y. S. 935;

Walters v. Chicago & Northwestern Ry. Co., 89 N. W. (Wis.) 367.

“Where, after the porter had announced the last station and opened the vestibule door of the car, plaintiff erroneously supposing that the train had stopped, stepped out into the vestibule, passed down the steps and thence to the platform while the train was moving, was injured in so doing, he was guilty of contributory negligence, precluding recovery.”

Mearns v. Central Ry. of New York, 139 Fed. 543, 71 C. C. A. 331.

“Leaving a moving train is *necessarily* contributory negligence on the part of a passenger.”

E. & T. H. Ry. Co. v. Athon, 33 N. E. (Indiana) 469.

In Gress v. Missouri Pacific Ry. Co., 84 S. W. Rep. 122, it is said:

“A passenger is guilty of contributory negligence as a *matter of law* in attempting to leave a train moving at the rate of *five miles* an hour.”

In Aguilo v. New York etc. Ry. Co., 43 Atl. 63, it is said:

“The fact that a carrier negligently leaves open a gate on the platform of its cars *does not make it*

*liable* for injury caused by one negligently attempting to alight from a moving train.”

In *Rosenthal v. Troy and N. E. Ry. Co.*, 147 N. Y. S. (1014) 725, it is said:

“A trolley passenger who may alight with safety on the station side, but who alights on the opposite side where there is a drop from the car step to the ground of about 30 inches, is *as matter of law* guilty of contributory negligence.”

“A person alighting from a train running from 10 to 15 miles an hour and increasing its speed as it is leaving a station, is GUILTY OF CONTRIBUTORY NEGLIGENCE.”

*Carter v. Seaboard Airline Railway Co.*, 81 S. E. (N. C. 1914) 321.

“Railroad passengers must exercise ordinary care to leave the train upon its arrival, as well as to ascertain the means of exit from the coach.”

*Fort Worth etc. Ry. Co. v. Taylor*, 162 S. W. (Texas 1914) 967.

“A passenger can not recover for injuries in alighting from a train when his own conduct was wanting in ordinary care for his own safety.”

*Saint Louis etc. Ry. Co. v. Platt*, 157 S. W. (Ark. 1914) 385.

“A passenger on a regular passenger train is not justified in relying on the promise of the engineer to slow down the train to permit him to alight on the assumption that he has authority to slow down trains for that purpose and the promise of



the engineer so to do is not a promise of the carrier."

Clark v. Santa Fe Railway Company, 128 Pac. 1032, 164 Cal. 363.

"The calling of a station by the brakeman and the opening of the door of the car is an invitation to the passenger desiring to alight at the station TO GET READY TO DO SO, but is an invitation to alight only AFTER THE TRAIN HAS STOPPED."

Illinois Central Railway Co. v. Dallas, 157 S. W. (Ky. 1914) 536

"It is negligence for a passenger to attempt to alight from a train when in motion."

Dallas v. Illinois Central Ry. Co., 139 S. W. (Ky. 1912) 958.

"Where plaintiff, a railroad passenger, on paying his fare was informed that the train did not stop at the station to which he desired to go, but on approaching the station heard two blasts of the whistle, which he supposed was a stop signal and told the brakeman that he desired to alight if the train stopped and the brakeman simply said, 'All right,' and opened the vestibule, and when plaintiff attempted to alight the train suddenly increased its speed and he was thrown and injured, he was guilty of contributory negligence, precluding recovery."

Chicago, Rock Island etc. Ry. Co. v. Clounts, 138 S. W. 332.

"A passenger is bound to use reasonable diligence and care in getting off a train."

40 Pa. Sup. Ct. 252.

“Ordinarily a passenger is not justified in alighting from a train in motion except at his own risk.”

Chicago etc. Railway Co. v. Lampman, 104 Pac. (Wyo.) 533.

“A passenger is guilty of contributory negligence as a MATTER OF LAW in attempting to leave a train moving at the rate of FIVE MILES an hour.”

Gress v. Missouri Pacific Ry. Co., 84 S. W. (Missouri) 122.

“The fact that a carrier negligently leaves open a gate on the platform of its cars DOES NOT MAKE IT LIABLE for injury caused by one negligently attempting to alight from a moving train.”

Agulino v. New York etc. Ry. Co., 43 Atl. (R. I.) 63.

“A trolley passenger who may alight with safety on the station side, but who alights on the opposite side where there is a drop from the car step to the ground of about 30 inches, is AS A MATTER OF LAW guilty of contributory negligence.”

Rosenthal v. Troy & N. E. Ry. Co., 147 N. Y. S. (1914) 725.

“A person who is carried beyond his station may not alight from a moving train, though invited to do so by an employee of the carrier, where the danger of alighting is apparent.”

Carter v. Seaboard Airline Ry. Co., 81 S. E. (N. C. 1914) 321.

Perhaps no better statement of the law governing this case could be found than that of the Honorable Trial Judge in the instant case, granting a non-suit

herein, reported in 225 Fed. Rep. 297, which reads as follows:

“It is probably true, as contended by plaintiff, that it is not negligence *per se* for a passenger to alight from a train while the train is moving. The presence or absence of negligence in such a case would depend upon the concomitant circumstances. The Supreme Court of California in Carr v. Eel River Railway Company, 98 Cal. 366, 33 Pac. 213, 21 L. R. A. 354, approved of an instruction to the effect that:

“‘Ordinarily a passenger would be held not to be justified in getting off the train while it is in motion, except at his own risk. Unless the train is moving very slowly, and the circumstances are specially favorable, it would be deemed *prima facie* negligence.’”

Construing this instruction further the court said:

“A passenger’s act in jumping from a moving train may be grossly negligent, and thereby release the carrier from all liability, notwithstanding it was done at the suggestion or upon the assurance of safety by the employe. The employe’s advice at the moment is in no sense conclusive upon the passenger as to his negligence or non-negligence in jumping from the train. Like every other circumstance surrounding the transaction, it casts some light upon the scene, and thereby aids the court according to the power and brilliancy of its light in each particular case, to determine what a careful, prudent man would have done, placed in the position of the unfortunate passenger. \* \* \* The earlier cases in many instances recognized the principle of negligence *per se* in alighting from a moving train, but mod-

ern authority to a great extent has supplanted that doctrine with broader views upon the question.

“Surely in the case at bar there were no circumstances ‘specially favorable,’ as referred to by the California Supreme Court, which would tend to remove the *prima facie* impression of negligence, caused by one who assumes the risk of attempting to alight from a moving train. On the contrary, the circumstances herein were to my mind more than ordinarily unfavorable. The night was dark, the train was moving at a considerable rate of speed, and the deceased was entirely unfamiliar with the condition of the ground upon which he was to alight. In addition he was incumbered with a grip or valise in one hand.

“The danger of attempting to alight under such circumstances was obvious to his companion, who was behind him, and it must have been obvious to him. To attempt to alight in the face of such danger, and in the face of such unpropitious circumstances, was substantially to take his life in his own hands.

“The suggestion is made by plaintiffs’ counsel that he may not have noticed his position and danger or that he may have lost his hold upon the car and fallen off accidentally. There is no proof, however, to support the inference that he fell off accidentally. In any event, there was nothing in the conduct of the brakeman to justify him in placing himself in, or permitting himself to get into, a place of danger, which by the use of the most casual observation and prudence upon his part could have been plainly obvious to him. I can come to no other conclusion than that the death of plaintiffs’ intestate was due to his want of care,

and that to permit the verdict of the jury to stand, and the defendant to be holden responsible therefor, would be to give countenance to a manifest and profound injustice.”

*Murray et al. v. Southern Pacific Company*, 225  
Fed. Rep. 297.

We trust that we may be pardoned for having presented the long list of authorities, but, feeling as we do that the conduct of the deceased was such as to *amount to contributory negligence as matter of law*, and that the action of the learned trial judge was entirely proper in so holding, we felt justified in citing the authorities at length, in order that this court might understand the conditions upon which his action was predicated.

Respectfully submitted,

HENRY T. GAGE and

W. I. GILBERT,

*Attorneys for Defendant in Error.*





United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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ALASKA MEXICAN GOLD MINING COM-  
PANY, a Corporation,  
Plaintiff in Error,  
vs.

THE TERRITORY OF ALASKA,  
Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court of the  
District of Alaska, Division No. 1.

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Filed

JAN 31 1916

F. D. Mondakian,

Clerk.



# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**[Names and Addresses of Attorneys.]**

Messrs. HELLENTHAL & HELLENTHAL, Juneau, Alaska,

Attorneys for Plaintiff in Error.

J. H. COBB, Esquire, Juneau Alaska,

Attorney for Defendant in Error. [1\*]

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*In the District Court for the District of Alaska,  
Division Number One, at Juneau.*

Case No. 1408—A.

TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA MEXICAN GOLD MINING COMPANY, a Corporation,

Defendant.

**Bill of Exceptions.**

BE IT REMEMBERED that the parties hereto desiring to submit to the Court, under the provisions of chapter 28, Alaska Code of Civil Procedure, a controversy existing between them, entered into and filed with the Court, in the proper office an agreed case and stipulation of facts, which is in words and figures as follows, to wit:

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\*Page-number appearing at foot of page of original certified Record.

**[Stipulation of Facts.]**

*In the District Court for the District of Alaska,  
Division Number One, at Juneau.*

Case No. 1408-A.

TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA MEXICAN GOLD MINING COM-  
PANY, a Corporation,

Defendant.

**AGREED CASE.**

Whereas a controversy exists between the Territory of Alaska and the Alaska Mexican Gold Mining Company, which might be the subject of an action, and whereas it is desired to submit such controversy for the decision of the court, under the provisions of chapter 28, Alaska Code of Civil Procedure,

NOW, THEREFORE, it is hereby stipulated and agreed:

**I.**

That the Alaska Mexican Gold Mining Company is a corporation duly incorporated under and by virtue of the laws of the State of Minnesota and doing business in the Territory of Alaska under and by virtue of the laws thereof; that it has paid its annual license taxes required of it [1a] for doing business as a corporation, under and by virtue of the provisions of chapter 11 of the Session Laws of 1913, and is in all respects duly qualified

to hold property, carry on business and maintain actions in the courts of the Territory of Alaska.

II.

That the Alaska Mexican Gold Mining Company is the owner of several mining claims situate on Douglas Island, Territory of Alaska; that these claims contain gold mines; that during the years 1913 and 1914, it was engaged in operating said gold mines;

That the net income resulting from the mining operations so carried on by the Alaska Mexican Gold Mining Company between July 31, 1913, and January 1, 1914, amounted to fifty-seven thousand five hundred seventy-two and 43/100 (\$59,655.77) dollars, and that the net income resulting from the mining operations so carried on by the Alaska Mexican Gold Mining Company for the calendar year of 1914 was one hundred fourteen thousand nine hundred fifty-three and 49/100 (\$119,953.49) dollars.

III.

The Alaska Mexican Gold Mining Company has complied fully during said year with all the provisions of the act of Congress providing for taxes on business and trade, paying thereunder a tax of three (\$3.00) dollars per annum on each of its one hundred and twenty (120) stamps.

IV.

The first session of the Alaska legislature passed a revenue bill which went into effect July 31, 1913, and is found printed in the Alaska Session Laws 1913, as chapter 52, which is here referred to and made a

part hereof the same as if written herein.

That the clerk of the District Court never filed a bond as required by the provisions of the act above referred to.

## V.

The Alaska Mexican Gold Mining Company did not apply for a license under the act last mentioned, during or for either of the years 1913 or 1914, and did not receive a license under the provisions of said act or otherwise for or during either of said years to carry on the business of mining, or any other license whatsoever, and did not pay to the Territory of Alaska for a license or otherwise the sum of one half of one per cent, or any other sum whatsoever under or in compliance with the provisions of the act last above referred to. [2]

## VI.

That the Alaska legislature at its second session passed an act which is printed in the Session Laws of Alaska, 1915, as chapter 76, and is here referred to for all the particulars thereof and made a part hereof the same as if herein written.

The manner of the passage of said act by the legislature is set out in detail in paragraph eight herein, and the statement in this paragraph contained "that the Alaska legislature passed said act" is not to be construed as an admission that said act was legally passed, but the question of whether said act was or was not legally passed is to be determined from the facts as set forth in detail in paragraph eight.

## VII.

That the Territory of Alaska has demanded of the

Alaska Mexican Gold Mining Company the payment of \$287.86 with legal interest thereon from January 15, 1914, claimed to be due it as taxes for the year 1913, and has also demanded of the Alaska Mexican Gold Mining Company the sum of \$574.76 with legal interest thereon from January 15, 1915, claimed to be due it as taxes for the year 1914.

### VIII.

The second session of the legislature which passed chapter 76, Session Laws of Alaska, 1915, convened on the 1st day of March, 1915, at 12 o'clock noon; that on the 29th day of April, 1915, said legislature adjourned, *sine die*, at 12 o'clock midnight, according to the official time-pieces of said legislature, that is to say, the clocks hanging in the halls of the two houses of the legislature were stopped or turned back by the sergeant-at-arms just prior to the hour of 12 o'clock midnight of April 29th, 1915, and thereafter between the hours of 3 and 4 o'clock A. / . sun time, of April 30, 1915, while the clocks in said halls of the legislature still indicated prior to midnight, being stopped or turned back as aforesaid, the said act, namely, chapter 76 of the Session Laws of Alaska, 1915, was finally passed by both houses of the legislature and approved by the governor and was enrolled and filed in the office of the Secretary of State for the Territory as it now appears in the printed volume of Session laws of Alaska, 1915, chapter 76; that the Governor of the Territory of Alaska did not call an extra session to pass said act.

### PRINCIPAL CONTENTION OF PARTIES.

It is contended on the part of the Territory of



Alaska that the defendant, the Alaska Mexican Gold Mining Company is indebted to it in the sum of \$287.86 with interest thereon from January 15, 1914, and the sum of \$574.76 with interest thereon from January 15, 1915, as unpaid taxes claimed to be due under and in accordance with the acts of the territorial legislature above referred to. [3]

I.

It is claimed on the part of the Alaska Mexican Gold Mining Company that it is not indebted to the Territory of Alaska, the plaintiff herein, in any sum whatsoever, as taxes or otherwise, and in this connection the Alaska Mexican Gold Mining Company contends:

That under the provisions of chapter 52 of the acts of the Territorial legislature for the year 1913, being entitled "An Act to establish a system of taxation, create revenue and provide for collection thereof for the Territory of Alaska and for other purposes," being the act first above referred to, no civil liability is created and the Alaska Mexican Gold Mining Company is not made, by the provisions of that act, civilly liable to the Territory of Alaska for the payment of any sum whatsoever, nor does that act contain any provision under which the said Alaska Mexican Gold Mining Company could or did become indebted to the Territory of Alaska in any sum whatsoever;

That said act merely makes it an offense to prosecute or attempt to prosecute any of the lines of business therein mentioned, including mining, without first applying for and obtaining a license so to do, making said offense a misdemeanor punishable as

provided in the act, without providing that those prosecuting or attempting to prosecute any of the lines of business for which such license is required shall be indebted to the Territory in any sum whatsoever;

And that the provisions of chapter 76 of the acts of the Territorial legislature for the year 1915, hereinbefore referred to, if construed to impose a liability, are retroactive and void as being obnoxious to the provisions of the Constitution of the United States.

## II.

That chapter 52 of the acts of the Territorial legislature of 1913 is void, as far as the matters and things herein, referred to are concerned, for the reason, among others, that it was impossible for the Alaska Mexican Gold Mining Company to comply with the provisions of said act and apply for or obtain a license, as therein provided, in that said act required the said company to apply for and procure a license in advance and pay therefor one half of one per cent on its net income which had not yet been earned and which it was impossible to calculate or determine in advance.

In this connection it is urged that said provisions of chapter 52, in so far as they relate to this case are void because upon a conviction for a violation thereof the Court would be powerless to impose a sentence since the amount fixed as a penalty is so indefinite and uncertain that no sentence could be imposed by the Court; that the clerk of the court [4] could not act as an officer for the Territory in

receiving the license fee or issuing the license and that the Judge could not act as a territorial officer in passing upon the license.

### III.

That said act, chapter 52 of the acts of the Territorial legislature of 1913, above referred to, is void, especially in so far as it relates to the facts in this case, for the reason that it compels those engaged in mining to make an application to the District Court or Judge thereof for a license to carry on such mining operations or business and reposes in said court or Judge thereof the arbitrary power of granting or refusing such license, giving said Court or Judge thereof the power to arbitrarily or capriciously deny an owner of mining claims a license to work or operate his said claims so that the Court or Judge would have the power in this case of denying the Alaska Mexican Gold Mining Company a license to operate or mine its mining claims and in so doing deprive the said company of its said property and also denying the said company the right to follow the useful and lawful occupation of mining, all of which is contrary to the provisions of the Constitution of the United States in that regard.

### IV.

That said chapter 52 of the Session Laws of the Alaska legislature for the year 1913 is void, especially in so far as it relates to the facts in this case for the further reason that under the provisions of said act a license is required not for the purpose of regulation under the police power, but for the purpose of raising revenue under the taxing power and

for the last-mentioned purpose alone;

That under the Organic Act of the Territory of Alaska providing for a legislature and conferring thereon the powers therein mentioned, the said legislature has no authority to require a license for the purpose of taxation or for the purpose of raising revenue, and that the power of said legislature in the collection of taxes is limited by the following provision, "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under General Laws, and the assessments shall be according to the actual value thereof," as well as by other provisions contained in the Organic Act; that under the provisions and limitations contained in said Organic Act, the Territorial legislature has no power or authority to impose a license tax or require the payment of a license fee for the purpose of raising revenue;

That the license tax sought to be imposed by the said act is levied without any assessment whatsoever and without any regard to the value of the subject or thing sought to be taxed, contrary to the provisions of the Organic Act in that regard. [5]

#### V.

That said chapter 52 of the Session Laws of the Territorial legislature for the year 1913, is void, especially in so far as it relates to the facts in this case, because it attempts to impose a tax not uniform upon the same class of subjects in this that one-half of one per cent is required on the net income in payment for the license to mine, except that those engaged in said business and having a net income less



than five thousand per annum, are not required to pay any sum whatsoever in payment of the license provided for, which said provision is in violation of the provision of the Organic Act that all taxes must be uniform upon the same class of subjects and is obnoxious to the provisions of the constitution of the United States in that behalf.

It is agreed and understood by and between the parties that while the contentions of the parties are herein set out in the main, either party shall be at liberty to urge any matter of law whatsoever in addition to the matters herein expressly contended for and that nothing herein contained shall be so construed as to limit either party in that regard, and in this connection it is expressly agreed that the Alaska Mexican Gold Mining Company does and shall have the right to urge the point that no civil remedy is provided by law for the collection of the sum for which judgment is sought or any part thereof, and further that the submission of the controversy in this manner, upon an agreed statement of facts, shall not be construed as an admission on the part of the Alaska Mexican Gold Mining Company that it is in any sense liable to the Territory of Alaska in any sum whatsoever, or that any cause of action exists against it in favor of the Territory of Alaska.

Upon the above and foregoing facts the Court is asked to render judgment, as it may find the law and the rights of the parties to be; and either party shall have the right to appeal on writ of error, sued out as an ordinary action upon the pleadings. And in consideration of the saving of expense and delay



by trying the controversy under this stipulation, the Territory waives all claims for penalties, and asks only a judgment for the amount of the taxes and legal interest thereon.

J. H. COBB,  
Chief Counsel for the Territory of Alaska.  
HELLENTHAL & HELLENTHAL,  
Attorneys for Defendant.

**[Affidavit of Governor Strong of Alaska.]**

United States of America,  
Territory of Alaska,—ss.

J. F. A. Strong, being first duly sworn, on oath deposes and says: That he is the Governor of the Territory of Alaska; that he has read the foregoing agreed case and statement of facts and knows the contents thereof and that [6] the controversy to which the same relates is a real controversy existing between the Territory of Alaska, on the one hand, and the Alaska Mexican Gold Mining Company on the other, and that this proceeding, or submission of this cause to the Court upon the statement of facts above referred to is taken in good faith to determine the rights of the parties.

J. F. A. STRONG.

Subscribed and sworn to before me this 9th day of December, 1915.

[Seal]

E. L. COBB,  
Notary Public for Alaska.

My commission expires Dec. 3d, 1918.

**[Affidavit of P. R. Bradley.]**

United States of America,  
Territory of Alaska,—ss.

P. R. Bradley, being first duly sworn on oath deposes and says: That he is the general superintendent as well as the agent and attorney in fact for the Alaska Mexican Gold Mining Company, the defendant above named; that he has read the foregoing agreed case and statement of facts and knows the contents thereof; and that the controversy existing between the plaintiff and defendant, that is to say, the Territory of Alaska and the Alaska Mexican Gold Mining Company, to which the above statement of facts relates, is a real controversy and that this proceeding, to wit, the submission of said controversy to the Court upon this agreed statement of facts is taken in good faith to determine the rights of the parties, and affiant further says that he is the person designated by the Alaska Mexican Gold Mining Company and appointed by said company as the agent upon whom service of process may be made, by an instrument in writing duly filed in the office of the Secretary of the Territory, under and pursuant to the laws relating to foreign corporations, and that he has duly accepted said appointment as by law required, and is in all respects fully authorized to make this verification.

P. R. BRADLEY.

Subscribed and sworn to before me this 8th day of December, 1915.

[Seal]

SIMON HELLENTHAL,

Notary Public for Alaska.

My commission expires Nov. 30, 1917.

Filed in the District Court, District of Alaska,  
First Division. Dec. 9, 1915. J. W. Bell, Clerk.

[7]

Whereupon said controversy and cause of action so existing between the Territory of Alaska, as plaintiff, and the Alaska Mexican Gold Mining Company, a corporation, as defendant, was by the parties submitted to the Court for its decision upon the agreed case and stipulation of facts aforesaid, and the plaintiff then and there requested the Court to enter judgment in its favor in the sum of \$862.61 and the defendant then and there requested the Court to conclude that it was not indebted to the plaintiff in the sum demanded or any other sum whatsoever, and accordingly to enter judgment in favor of the defendant. This request of the defendant was then and there denied by the Court, to which ruling and order of the Court the defendant then and there excepted on the following grounds:

I.

That under the provisions of chapter 52 of the acts of the Territorial legislature for the year 1913, being entitled "An Act to establish a system of taxation, create revenue and provide for collection thereof for the Territory of Alaska and for other purposes," being the act first above referred to, no civil liability is created and the Alaska Mexican Gold

Mining Company is not made, by the provisions of that act, civilly liable to the Territory of Alaska for the payment of any sum whatsoever, nor does that act contain any provision under which the said Alaska Mexican Gold Mining Company could or did become indebted to the Territory of Alaska in any sum whatsoever; [8]

That said act merely makes it an offense to prosecute or attempt to prosecute any of the lines of business therein mentioned, including mining, without first applying for and obtaining a license so to do, making said offense a misdemeanor punishable as provided in the act, without providing that those prosecuting or attempting to prosecute any of the lines of business for which such license is required shall be indebted to the Territory in any sum whatsoever;

And that the provisions of chapter 76 of the acts of the Territorial legislature for the year 1915, hereinbefore referred to, if construed to impose a liability, are retroactive and void as being obnoxious to the provisions of the Constitution of the United States.

## II.

That chapter 52 of the acts of the Territorial legislature of 1913 is void, as far as the matters and things herein referred to are concerned, for the reason, among others, that it was impossible for the Alaska Mexican Gold Mining Company to comply with the provisions of said act and apply for or obtain a license, as therein provided, in that said act required the said company to apply for and procure

a license in advance and pay therefor one half of one per cent on its net income which had not yet been earned, and which it was impossible to calculate or determine in advance.

In this connection it is urged that said provisions of chapter 52, in so far as they relate to this case are void because upon a conviction for a violation thereof the Court would be powerless to impose a sentence since the amount fixed as a penalty is so indefinite and uncertain that no sentence [9] could be imposed by the Court; that the clerk of the court could not act as an officer for the Territory in receiving the license fee or issuing the license and that the Judge could not act as a territorial officer in passing upon the license.

### III.

That said act chapter 52 of the acts of the Territorial legislature of 1913, above referred to, is void especially in so far as it relates to the facts in this case for the reason that it compels those engaged in mining to make an application to the District Court or Judge thereof for a license to carry on such mining operations or business and reposes in said Court or Judge thereof the arbitrary power or granting or refusing such license, giving said Court or Judge the power to arbitrarily or capriciously deny an owner of mining claims a license to work or operate his said claims so that the Court or Judge would have the power in this case of denying the Alaska Mexican Gold Mining Company a license to operate or mine its mining claims and in so doing deprive the said company of its said property and



also denying the said company the right to follow the useful and lawful occupation of mining, all of which is contrary to the provisions of the Constitution of the United States in that regard.

#### IV.

That said chapter 52 of the Session Laws of the Alaska legislature for the year 1913, is void especially in so far as it relates to the facts in this case for the further reason that under the provisions of said act a license is required not for the purpose of regulation under the police [10] power, but for the purpose of raising revenue under the taxing power and for the last-mentioned purpose alone;

That under the Organic Act of the Territory of Alaska providing for a legislature and conferring thereon the powers therein mentioned, the said legislature has no authority to require a license for the purpose of taxation or for the purpose of raising revenue, and that the power of said legislature in the collection of taxes is limited by the following provision, "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof," as well as by other provisions contained in the Organic Act; that under the provisions and limitations contained in said Organic Act, the territorial legislature has no power or authority to impose a license tax or require the payment of a license fee for the purpose of raising revenue;

That the license tax sought to be imposed by the said act is levied without any assessment whatso-

ever and without any regard to the value of the subject or thing sought to be taxed, contrary to the provisions of the Organic Act in that regard.

V.

That said chapter 52 of the Session Laws of the territorial legislature for the year 1913, is void, especially in so far as it relates to the facts in this case, because it attempts to impose a tax not uniform upon the same class of subjects in this that one half of one per cent is required on the net income in payment for the license to mine, except [11] that those engaged in said business and having a net income less than five thousand per annum, are not required to pay any sum whatsoever in payment of the license provided for, which said provision is in violation of the provision of the Organic Act that all taxes must be uniform upon the same class of subjects and is obnoxious to the provisions of the Constitution of the United States in that behalf.

Which exception was then and there allowed by the Court.

The defendant duly and regularly and at the time the Court so concluded, objected and excepted to conclusion number one, contained in the judgment which is in words and figures as follows:

“That the defendant is liable for the license tax laid by the Territory of Alaska in chapter 52 of the Session Laws of 1913.”

which objection and exception is based on the ground that chapter 52 of the Session Laws of 1913, especially in so far as the provisions thereof relate

to the facts contained in the agreed statement of facts herein, is invalid and void because the same is so uncertain that it cannot be enforced, because the provisions thereof are such that it is impossible to comply therewith, because the act confers upon the Court or Judge arbitrary power to deprive the defendant of property and of the right to follow the occupation of mining, in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States and that the act is void as being in conflict with the provisions of the Federal Constitution, for the various reasons set out in detail in the stipulation of facts herein, and further, that the act is void and invalid as being passed by the [12] legislature without authority and as being in violation of the provisions of the Organic Act of the Territory, because under the provisions of said act said legislature had no power to levy, lay or collect a tax other than a tax based upon value and upon an assessment of the property taxed, and further that the tax in question violates the provisions of the Organic Act in that it is not uniform upon the same class of subjects, incomes of five thousand dollars being exempt. And that said act is in violation of said Organic Act for the various reasons set out in detail in the agreed statement of facts herein, all of which said reasons set out in said statement of facts, both in regard to the conflict between the Organic Act and the act of the legislature under discussion, chapter 52 of the Laws of 1913, and as to the conflict between said act and the provisions of the Constitution of the United States, are to be re-

garded as if repeated and incorporated in this exception. And this exception is based upon the further ground that no civil liability exists under the provisions of chapter 52 of the Session Laws of 1913, which exception was then and there allowed by the Court.

The defendant, then and there and at the time, further objected and excepted to conclusion of law number two, as the same was embodied in the judgment, which reads as follows:

That the tax so due may be recovered in a civil action under the provisions of chapter 76 Session Laws of Alaska, 1915.

This conclusion was objected to and excepted to on the ground, among others, that chapter 52 of the Laws of 1913, did not create any civil liability, and that chapter 76 of the Laws of 1915, could not create such liability without the same being retroactive, [13] and that to that extent chapter 76 of the Laws of 1915, was void as being in conflict with the provisions of the Constitution of the United States; further that no taxes were laid by chapter 52 of the Laws of 1913, which could under any circumstances be the subject of a civil action; that chapter 52 of the Laws of 1913 is a criminal statute imposing no civil liability; that chapter 76 of the Laws of 1915 is void in so far as it attempts to give a civil remedy in relation to the matters and things dealt with in chapter 52 of the Session Laws of 1915, in that such legislation would change the remedy from a criminal to a civil one, deprive the defendant of the right of a trial in accordance with the rules of criminal pro-



cedure and make the defendant liable to a fine and penalty imposed by a purely criminal statute in accordance with the rules of proof and rules of procedure applicable to civil cases; that said chapter 76 of the Laws of 1915, is in that regard retroactive and void; that exception is further taken to the said conclusion of law number two on the ground and for each and all of the reasons urged in the statement of facts as the contentions of the defendant, and the same and each and all of the same are to be regarded as written herein, which exception was then and there allowed by the Court.

Whereupon the Court entered its judgment for the plaintiff over the objection of the defendant, to which ruling and order of the Court, the defendant excepted, which exception was then and there allowed by the Court.

**[Order Settling and Allowing Bill of Exceptions,  
etc.]**

And now this matter coming on to be heard on the application of the defendant asking that the above and foregoing be settled and allowed as a bill of exceptions herein [14] and the Court being fully advised in the premises finds that the above and foregoing is a true, full and correct bill of exceptions; that the same contains a true and accurate record of all the proceedings had herein; that no evidence was adduced in the cause, but the cause submitted upon an agreed statement as herein set forth, which said foregoing agreed statement it is hereby certified contains all the facts stipulated to by the parties upon which the cause was submitted.



NOW, THEREFORE, it is ordered that the above and foregoing be signed, settled and allowed by the Court as a true, full and correct bill of exceptions herein containing a full, true, accurate and correct record of all the proceedings had herein, and it is further ordered that said bill of exceptions so signed, settled and allowed shall be and constitute a part of the record in this cause.

Done in open court this 27th day of December, A. D., 1915.

ROBERT W. JENNINGS,  
Judge.

COBB.

Filed in the District Court, District of Alaska,  
First Division. Dec. 27, 1915. J. W. Bell, Clerk.  
By C. Z. Denny, Deputy. [15]

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*In the District Court for the Territory of Alaska,  
Division Number One, at Juneau.*

No. 1408—A.

TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA MEXICAN GOLD MINING COM-  
PANY, a Corporation,

Defendant.

**Judgment.**

This cause came on regularly to be heard upon the agreed statement filed herein and was submitted to the Court for decision under the provisions of chapter 28 of the Alaska Code of Civil Procedure. And

the Court having heard said statement and fully considered the same, concludes as a matter of law from the facts therein stated:

I.

That the defendant is liable for the license tax laid by the Territory of Alaska in chapter 52 of the Session Laws of 1913.

II.

That the taxes so due may be recovered in a civil action under the provisions of chapter 76, Session Laws of Alaska 1915.

IT IS THEREFORE CONSIDERED BY THE COURT and so ordered and adjudged and decreed that the plaintiff, the Territory of Alaska, do have and recover of and from the defendant, Alaska Mexican Gold Mining Company, a corporation, the sum of Eight Hundred and Sixty-Two and 61/100 Dollars (\$862.61) together with costs herein to be taxed by the clerk, for all of which let execution issue. [16]

Done in open court this the 27th day of December, 1915.

ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska, First Division. Dec. 27, 1915. J. W. Bell, Clerk.  
By ———, Deputy. [17]

*In the District Court for the Territory of Alaska,  
Division Number One, at Juneau.*

No. 1408—A.

THE TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA MEXICAN GOLD MINING COM-  
PANY, a Corporation,

Defendant.

*United States Circuit Court of Appeals for the  
Ninth Circuit, Holden at San Francisco.*

Case No. 1408—A.

ALASKA MEXICAN GOLD MINING COM-  
PANY, a Corporation,

Plaintiff in Error,

vs.

TERRITORY OF ALASKA,

Defendant in Error.

**Petition for Writ or Error and Allowance Thereof.**

To the Honorable ROBERT W. JENNINGS, Judge  
of the District Court for the Territory of  
Alaska, Division Number One:

Now comes the above-named Alaska Mexican Gold Mining Company, a corporation, the plaintiff in error herein, by its attorneys, Hellenthal & Hellenthal, and complains that in the record and proceedings had in the District Court for the Territory of Alaska, Division Number One, in the case of the Territory of Alaska, plaintiff and defendant in er-

ror, against the Alaska Mexican Gold Mining Company, defendant, and plaintiff in error, and also in the rendition of the judgment in said cause in the District Court for the Territory of Alaska, Division Number One, against the Alaska Mexican Gold Mining Company on the 27th day of December, 1915, wherein the District Court for the Territory of Alaska adjudged the defendant, the Alaska Mexican Gold Mining Company, to be indebted to the plaintiff, the Territory [18] of Alaska, in the sum of \$862.61, and wherein the plaintiff, the Territory of Alaska, was given judgment against the defendant, the Alaska Mexican Gold Mining Company, for the sum of \$862.61, and costs, taxed at \$——, manifest error hath happened to the great damage of said Alaska Mexican Gold Mining Company, as will more fully appear from the assignment of errors filed herewith.

WHEREFORE the Alaska Mexican Gold Mining Company prays for the allowance of a writ of error, and for an order fixing the amount of the bond in said cause, and for such other orders and processes as may cause the said errors to be corrected by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 28th day of December, A. D., 1915.

HELLENTHAL & HELLENTHAL,  
Attorneys for Alaska Mexican Gold Mining Company.

The above petition for writ of error is allowed and the bond fixed at \$1,500.00 (\$1,500.00) dollars, to be approved by the clerk or Judge of the above-entitled

court. Dated this 28th day of December, 1915.

ROBERT W. JENNINGS,

Judge.

O. K.—COBB.

Filed in the District Court, District of Alaska,  
First Division. Dec. 28, 1915. J. W. Bell, Clerk.  
By —————, Deputy. [19]

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*In the District Court for the Territory of Alaska,  
Division Number One.*

Case No. 1408—A.

TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA MEXICAN GOLD MINING COM-  
PANY, a Corporation,

Defendant.

*United States Circuit Court of Appeals for the  
Ninth Circuit Holden at San Francisco.*

ALASKA MEXICAN GOLD MINING COM-  
PANY, a Corporation,

Plaintiff in Error,

vs.

TERRITORY OF ALASKA,

Defendant in Error.

**Assignment of Errors.**

Comes now the Alaska Mexican Gold Mining Company, the plaintiff in error, and assigns the following errors committed by the Court in connection



with the trial and rendition of judgment herein, the errors so assigned being the errors which the plaintiff in error intends to urge before the United States Circuit Court of Appeals for the Ninth Circuit, and are the errors relied upon for a reversal of the Judgment herein:

First Error Assigned.

That the Court erred upon the submission of the cause to it on the agreed statement of facts in not concluding that the defendant was not indebted to the plaintiff in the sum demanded or in any sum whatsoever and entering judgment in favor [20] of the defendant accordingly as it was requested to do by the defendant at the time the cause was submitted.

Second Error Assigned.

That the Court erred in adopting as its conclusion, conclusion of law number one contained in the judgment, "That the defendant is liable for the license tax laid by the Territory of Alaska in chapter 52 of the Session Laws of 1913."

Third Error Assigned.

That the Court erred in adopting as its conclusion, conclusion of law number two embodied in the judgment, which reads as follows: "That the tax so due may be recovered in a civil action under the provisions of chapter 76, Session Laws of Alaska, 1915."

Fourth Error Assigned.

That the Court erred in entering judgment for the plaintiff and against the defendant.

HELLENTHAL & HELLENTHAL,  
Attorneys for Alaska Mexican Gold Mining Com-  
pany.

Due service by copy admitted this 27 day of December, 1915.

J. H. COBB,  
Chief Counsel for Territory of Alaska.

Filed in the District Court, District of Alaska,  
First Division, Dec. 28, 1915. J. W. Bell, Clerk. By  
L. E. Spray, Deputy. [21]

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*In the District Court for the Territory of Alaska,  
Division Number One, at Juneau.*

Case No. 1408-A.

TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA MEXICAN GOLD MINING COM-  
PANY, a Corporation,

Defendant.

*United States Circuit Court of Appeals for the  
Ninth Circuit Holden at San Francisco.*

Case No. 1408-A.

ALASKA MEXICAN GOLD MINING COM-  
PANY, a Corporation,

Plaintiff in Error,

vs.

TERRITORY OF ALASKA,

Defendant in Error.

**Writ of Error.**

United States of America,—ss.

The President of the United States of America to  
the Honorable ROBERT W. JENNINGS,  
Judge of the District Court for the Territory  
of Alaska, Division Number One, Greeting:

Because in the record and proceedings, as also in  
the rendition of the judgment of a plea, which is in  
said District Court, Division Number One thereof,  
before you, between the Territory of Alaska, as plain-  
tiff, and the Alaska Mexican Gold Mining Company,  
a corporation, as defendant, a manifest error hath  
happened to the great prejudice and damage of the  
said Alaska Mexican Gold Mining Company as set  
forth and appears by the petition herein, [22]

We, being willing that error, if any hath hap-  
pened, should be duly corrected and full and speedy  
justice done to the parties aforesaid in this behalf,  
do command you, if judgment be therein given, that  
then under your seal distinctly and openly you send  
the records and proceedings aforesaid with all things  
concerning the same to the Justices of the United  
States Circuit Court of Appeals for the Ninth Cir-  
cuit, in the city of San Francisco, in the State of Cali-  
fornia, together with this writ, so as to have the same  
at said place and said circuit on or before thirty days  
from the date hereof, that the record and proceedings  
aforesaid being inspected the said Circuit Court of  
Appeals may cause further to be done therein to cor-  
rect those errors what of right, and according to the

laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 28 day of December, A. D. 1915.

Attest my hand and the seal of the District Court for the Territory of Alaska, Division Number One, at the clerk's office at Juneau on the day and year last above written.

[Seal]

J. W. BELL,  
Clerk of the District Court for the Territory of  
Alaska, Division No. 1.

Allowed this 28 day of December, A. D. 1915.

ROBERT W. JENNINGS,  
Judge.

Service of the foregoing writ of error is admitted  
this Dec. 28th, 1915.

J. H. COBB,  
Chief Counsel, Ter. of Alaska.

O. K.—COBB.

Filed in the District Court, District of Alaska,  
First Division, Dec. 28, 1915. J. W. Bell, Clerk.  
By ———, Deputy. [23]

*In the District Court for the Territory of Alaska,  
Division Number One, at Juneau.*

Case No. 1408-A.

TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA MEXICAN GOLD MINING COM-  
PANY, a Corporation,

Defendant.

*United States Circuit Court of Appeals for the Ninth  
Circuit, Holden at San Francisco.*

Case No. 1408-A.

ALASKA MEXICAN GOLD MINING COM-  
PANY, a Corporation,

Plaintiff in Error,

vs.

TERRITORY OF ALASKA,

Defendant in Error.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS,  
that we, the Alaska Mexican Gold Mining Company,  
a corporation, as principal, and Charles Goldstein, as  
surety, are held and firmly bound unto the above-  
named Territory of Alaska in the just and full sum  
of Fifteen Hundred (\$1,500) Dollars, to be paid to  
the said Territory of Alaska, its attorneys or assigns,  
to which payment, well and truly to be made, we bind  
ourselves, our heirs, executors and administrators,  
jointly and severally by these presents. Sealed with



our seals and dated this 28th day of December, A. D. 1915.

WHEREAS, lately in the District Court for the Territory of Alaska, Division Number One, in an action therein pending between the Territory of Alaska, as plaintiff, and the Alaska Mexican Gold Mining Company, a corporation, as defendant, [24] a judgment was rendered against the said Alaska Mexican Gold Mining Company for the sum of \$862.61 and costs, and the said Alaska Mexican Gold Mining Company having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid action and the citation directed to the said Territory of Alaska, citing and admonishing it to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, within thirty days from the date of approval of this bond,

Now, the condition of the above obligation is such that if the said Alaska Mexican Gold Mining Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its said plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

ALASKA MEXICAN GOLD MINING CO.

By J. O. HELLENTHAL,

Its Attorney,

Principal.

CHARLES GOLDSTEIN,

Signed, sealed and delivered in the presence of:

B. A. ROESELLE.

A. GOLDSTEIN.

The above and foregoing Supersedeas and cost bond is hereby duly approved, not only as to form, but also as to the surety thereon, this 28 day of December, 1915.

ROBERT W. JENNINGS,  
Judge of the District Court for the Territory of  
Alaska, Division Number One.

O. K.—COBB.

Filed in the District Court, District of Alaska,  
First Division. Dec. 28, 1915. J. W. Bell, Clerk.  
By —————, Deputy. [25]

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*In the District Court for the Territory of Alaska,  
Division Number One, at Juneau.*

Case No. 1408-A.

TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA MEXICAN GOLD MINING COM-  
PANY, a Corporation,

Defendant.

*United States Circuit Court of Appeals for the Ninth  
Circuit, Holden at San Francisco.*

Case No. 1408-A.

ALASKA MEXICAN GOLD MINING COM-  
PANY, a Corporation,

Plaintiff in Error,

vs.

TERRITORY OF ALASKA,

Defendant in Error.

**Citation on Writ of Error.**

The President of the United States to the Territory of Alaska, the Above-named Plaintiff and Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, within thirty (30) days from the date of this citation, pursuant to a writ of error filed in the clerk's office of the District Court for the Territory of Alaska, Division Number One, where the Alaska Mexican Gold Mining Company, a corporation, is the plaintiff in error and you, the said Territory of Alaska, are the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should [26] be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 28th day of December, A. D. 1915, and of the Independence of the United States the 139th.

ROBERT W. JENNINGS,  
Judge.

Service of the foregoing citation admitted this Dec. 28th, 1915.

J. H. COBB,  
Chief Counsel, Ter. of Alaska.

O. K.—COBB.

Filed in the District Court, District of Alaska,  
First Division. Dec. 28, 1915. J. W. Bell, Clerk.  
By ———, Deputy. [27]

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*In the District Court for the Territory of Alaska,  
Division Number One, at Juneau.*

Case No. 1408-A.

TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA MEXICAN GOLD MINING COM-  
PANY, a Corporation,

Defendant.

**Praeipce [for Transcript of Record].**

Kindly prepare certified copies for transmission to the United States Circuit Court of Appeals in connection with your return of the Writ of Error herein as follows: Bill of Exceptions, Judgment, Petition for Writ of Error and Order allowing the same, Assignment of Errors, Writ of Error, Bond on Writ of Error, and Citation on Writ of Error.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendant.

Filed in the District Court, District of Alaska,  
First Division. Dec. 28, 1915. J. W. Bell, Clerk.  
By ———, Deputy. [28]

*In the District Court for the District of Alaska, Division No. 1, at Juneau, Alaska.*

**Certificate [of Clerk U. S. District Court to Transcript of Record].**

United States of America,  
District of Alaska,  
Division No. 1,—ss.

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 28 pages of typewritten matter, numbered from 1 to 28, both inclusive, constitute a full, true, and complete copy, and the whole thereof, prepared in accordance with the praccipe of defendant and plaintiff in error, on file in my office, and made a part hereof in Cause No. 1408-A, Territory of Alaska, Plaintiff, vs. Alaska Mexican Gold Mining Company, a Corporation, Defendant.

I further certify that said record is by virtue of the Writ of Error and Citation issued in this cause, and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate amounting to twenty-five dollars (\$25.00), has been paid to me by counsel for plaintiff in error.

In witness whereof I have hereunto set my hand and the seal of the above-entitled court this 28th day of December, 1915.

[Seal]

J. W. BELL,  
Clerk.

By \_\_\_\_\_,  
Deputy.



[Endorsed]: No. 2727. United States Circuit Court of Appeals for the Ninth Circuit. Alaska Mexican Gold Mining Company, a Corporation, Plaintiff in Error, vs. The Territory of Alaska, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District Court of Alaska, Division No. 1.

Filed January 5, 1916.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.





NO. 2727

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In the  
United States  
Circuit Court of Appeals  
For the Ninth Circuit

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ALASKA MEXICAN GOLD MINING COMPANY,  
a corporation,

Plaintiff in Error,

vs.

TERRITORY OF ALASKA,  
Defendant in Error.

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**Brief of Plaintiff in Error**

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Upon Writ of Error to the United States  
District Court for the District of  
Alaska, Division No. 1.

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HELLENTHAL & HELLENTHAL,  
Attorneys for Plaintiff in Error.

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In the  
United States  
Circuit Court of Appeals  
For the Ninth Circuit

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ALASKA MEXICAN GOLD MINING COMPANY,  
a corporation,

Plaintiff in Error,

vs.

TERRITORY OF ALASKA,

Defendant in Error.

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**Brief of Plaintiff in Error**

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Upon Writ of Error to the United States  
District Court for the District of  
Alaska, Division No. 1.

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HELLENTHAL & HELLENTHAL,  
Attorneys for Plaintiff in Error.

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## STATEMENT OF FACTS.

This proceeding was brought by the Territory of Alaska against the Alaska Mexican Gold Mining Company to recover taxes alleged to be due under an act of the Territorial Legislature. It is a test case in that the payment of taxes by others similarly situated is delayed pending a decision herein.

On the 24th day of August, 1912, Congress passed the Organic Act of the erritory of Alaska, which is in words and figures as follows: (The pertinent portions are in italics.)

(PUBLIC—NO. 334.)

(H. R. 38.)

An Act to create a legislature in the Territory of Alaska, to confer legislative power thereon, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

ALASKA TERRITORY ORGANIZED.—That the territory ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, and known as Alaska, shall be and constitute the Territory of Alaska under the laws of the United States, the government of which shall be



organized and administered as provided by said laws.

SEC. 2. CAPITAL AT JUNEAU.—That the capital of the Territory of Alaska shall be at the city of Juneau, Alaska, and the seat of government shall be maintained there.

SEC. 3. CONSTITUTION AND LAWS OF UNITED STATES EXTENDED.—*That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature: Provided, That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to bur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled "An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and*

*support of insane persons in the District of Alaska, and for other purposes," approved January twenty-seventh, nineteen hundred and five, and the several Acts amendatory thereof: Provided further, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses. And the legislature shall pass no law depriving the judges and officers of the district court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of district courts of the United States.*

SEC. 4. THE LEGISLATURE.—That the legislative power and authority of said Territory shall be vested in a legislature, which shall consist of a senate and house of representatives. The senate shall consist of eight members, two from each of the four judicial divisions into which Alaska is now divided by Act of Congress, each of whom shall have at the time of his election the qualifications of an elector in Alaska, and shall have been a resident and an inhabitant in the division from which he is elected for at least two years prior to the date of his election. The term of office of each member of the senate shall be four years: *Provided*, That immediately after they shall be assembled in consequence of the first election they shall, by lot or drawing, be divided in each division into two classes; the seats of the members of the first class shall be vacated at the end of two years and the seats of the members of the second class shall be vacated at the end of four years, so

organized and administered as provided by said laws.

SEC. 2. CAPITAL AT JUNEAU.—That the capital of the Territory of Alaska shall be at the city of Juneau, Alaska, and the seat of government shall be maintained there.

SEC. 3. CONSTITUTION AND LAWS OF UNITED STATES EXTENDED.—*That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature: Provided, That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to bur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled "An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and*

*support of insane persons in the District of Alaska, and for other purposes," approved January twenty-seventh, nineteen hundred and five, and the several Acts amendatory thereof: Provided further, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses. And the legislature shall pass no law depriving the judges and officers of the district court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of district courts of the United States.*

SEC. 4. THE LEGISLATURE.—That the legislative power and authority of said Territory shall be vested in a legislature, which shall consist of a senate and house of representatives. The senate shall consist of eight members, two from each of the four judicial divisions into which Alaska is now divided by Act of Congress, each of whom shall have at the time of his election the qualifications of an elector in Alaska, and shall have been a resident and an inhabitant in the division from which he is elected for at least two years prior to the date of his election. The term of office of each member of the senate shall be four years: *Provided*, That immediately after they shall be assembled in consequence of the first election they shall, by lot or drawing, be divided in each division into two classes; the seats of the members of the first class shall be vacated at the end of two years and the seats of the members of the second class shall be vacated at the end of four years, so



that one member of the senate shall, after the first election, be elected bienially at the regular election from each division. The house of representatives shall consist of sixteen members, four from each of the four judicial divisions into which Alaska is now divided by Act of Congress. The term of office of each representative shall be for two years and each representative shall possess the same qualifications as are prescribed for members of the senate and the persons receiving the highest number of legal votes in each judicial division cast in said election for senator or representative shall be deemed and declared elected to such office: *Provided*, That in the event of a tie vote the candidates thus affected shall settle the question by lot. In case of a vacancy in either branch of the legislature the governor shall order an election to fill such vacancy, giving due and proper notice thereof. That each member of the legislature shall be paid by the United States the sum of fifteen dollars per day for each day's attendance while the legislature is in session, and mileage, in addition, at the rate of fifteen cents per mile for each mile from his home to the capital and return by the nearest traveled route.

SEC. 5. ELECTION OF MEMBERS OF THE LEGISLATURE.—That the first election for members of the Legislature of Alaska shall be held on the Tuesday next after the first Monday in November, nineteen hundred and twelve, and all subsequent elections for the election of such members shall be held on the



Tuesday next after the first Monday in November biennially thereafter; that the qualifications of electors, the regulations governing the creation of voting precincts, the appointment and qualifications of election officers, the supervision of elections, the giving of notices thereof, the forms of ballots, the register of votes, the challenging of voters, and the returns and the canvass of the returns of the result of all such elections for members of the legislature shall be the same as those prescribed in the Act of Congress entitled "An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska," approved May seventh, nineteen hundred and six, and all the provisions of said Act which are applicable are extended to said elections for members of the legislature, and shall govern the same, and the canvassing board created by said Act shall canvass the returns of such elections and issue certificates of election to each member elected to the said legislature; and all the penal provisions contained in section fifteen of the said Act shall apply to elections for members of the legislature as fully as they now apply to elections for Delegate from Alaska to the House of Representatives.

SEC. 6. CONVENING AND SESSIONS OF LEGISLATURE.—*That the Legislature of Alaska shall convene at the capitol at the city of Juneau, Alaska, on the first Monday in March in the year nineteen hundred and thirteen, and on the first Monday in March*

*every two years thereafter; but the said legislature shall not continue in session longer than sixty days in any two years unless again convened in extraordinary session by a proclamation of the governor, which shall set forth the object thereof and give at least thirty days' written notice to each member of said legislature, and in such case shall not continue in session longer than fifteen days. The governor of Alaska is hereby authorized to convene the legislature in extraordinary session for a period not exceeding fifteen days when requested to do so by the President of the United States, or when any public danger or necessity may require it.*

SEC. 7. ORGANIZATION OF THE LEGISLATURE.—That when the legislature shall convene under the law, the senate and house of representatives shall each organize by the election of one of their number as presiding officer, who shall be designated in the case of the senate as “president of the senate” and in the case of the house of representatives as “speaker of the house of representatives,” and by the election by each body of the subordinate officers provided for in section eighteen hundred and sixty-one of the United States Revised Statutes of eighteen hundred and seventy-eight, and each of said subordinate officers shall receive the compensation provided in that section: *Provided*, That no person shall be employed for whom salary, wages, or compensation is not provided in the appropriation by Congress.

SEC. 8. ENACTING CLAUSE—SUBJECT OF ACT.

—That the enacting clause of all laws passed by the legislature shall be “Be it enacted by the Legislature of the Territory of Alaska.” No law shall embrace more than one subject, which shall be expressed in its title.

SEC. 9. LEGISLATIVE POWER.—LIMITATIONS.—

*The legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents; nor shall the legislature grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the affirmative approval of Congress; nor shall the legislature pass local or special laws in any of the cases enumerated in the Act of July thirtieth, eighteen hundred and eighty-six; nor shall it grant private charters or special privileges, but it may, by general act, permit persons to associate themselves together as bodies corporate for manufacturing, mining, agricultural, and other industrial pursuits, and for the conduct of business of insurance, savings banks, banks of discount and deposit (but not of issue), loans, trust, and guaranty associations, for the establishment and conduct of cemeteries, and for the construction and operation of railroads, wa-*

gon roads, vessels, and irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific association, but the authority embraced in this section shall only permit the organization of corporations or associations whose chief business shall be in the Territory of Alaska; no divorce shall be granted by the legislature, nor shall any divorce be granted by the courts of the Territory, unless the applicant therefor shall have resided in the Territory for two years next preceding the application, which residence and all causes for divorce shall be determined by the court upon evidence adduced in open court; nor shall any lottery or the sale of lottery tickets be allowed; nor shall the legislature or any municipality interfere with or attempt in anywise to limit the Acts of Congress to prevent and punish gambling, and all gambling implements shall be seized by the United States marshal or any of his deputies, or constable or police officer, and destroyed; nor shall spirituous or intoxicating liquors be manufactured or sold, except under such regulations and restrictions as Congress shall provide; nor shall any public money be appropriated by the Territory or any municipal corporation therein for the support or benefit of any sectarian, denominational, or private school, or any school not under the exclusive control of the government, nor shall the Government of the Territory of Alaska or any polit-



ical or municipal corporation or subdivision of the Territory make any subscription to the capital stock of any incorporated company, or in any manner lend its credit for the use thereof; nor shall the Territory, or any municipal corporation therein, have power or authority to create or assume any bonded indebtedness whatever; nor to borrow money in the name of the Territory or of any municipal division thereof; nor to pledge the faith of the people of the same for any loan whatever, either directly or indirectly; nor to create, nor to assume, any indebtedness, except for the actual running expenses thereof; and no such indebtedness for actual running expenses shall be created or assumed in excess of the actual income of the Territory or municipality for that year, including as a part of such income appropriations then made by Congress and taxes levied and payable and applicable to the payment of such indebtedness and cash and other money credits on hand and applicable and not already pledged for prior indebtedness: *Provided*, That all authorized indebtedness shall be paid in the order of its creation, *all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof*. No tax shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year; nor shall any incorporated town or municipality levy any tax, for any purpose, in excess



of two per centum of the assessed valuation of property within the town in any one year; *Provided*, That the Congress reserves the exclusive power for five years from the date of the approval of this Act to fix and impose any tax or taxes upon railways or railway property in Alaska, and no acts or laws passed by the Legislature of Alaska providing for a county form of government therein shall have any force or effect until it shall be submitted to and approved by the affirmative action of Congress; and all laws passed, or attempted to be passed, by such legislation in said Territory inconsistent with the provisions of this section shall be null and void: *Provided further*, That nothing herein contained shall be held to abridge the right of the legislature to modify the qualifications of electors by extending the elective franchise to women.

SEC. 10. RULES, QUORUM, AND MAJORITY.—That the senate and house of representatives shall each choose its own officers, determine the rules of its own proceedings not inconsistent with this Act, and keep a journal of its proceedings; that the ayes and noes of the members of either house on any question shall, at the request of one-fifth of the members present, be entered upon the journal; that a majority of the members to which each house is entitled shall constitute a quorum of such house for the conduct of business, of which quorum a majority vote shall suffice; that a smaller number than a quorum may adjourn from day to day and compel the attend-

ance of absent members, in such manner and under such penalties as each house may provide; that for the purpose of ascertaining whether there is a quorum present the presiding officer shall count and report the actual number of members present.

SEC. 11. LEGISLATOR SHALL NOT HOLD OTHER OFFICE.—That no member of the legislature shall hold or be appointed to any office which has been created, or the salary or emoluments of which have been increased, while he was a member, during the term for which he was elected and for one year after the expiration of such term; and no person holding a commission or appointment under the United States shall be a member of the legislature or shall hold any office under the government of said Territory.

SEC. 12. EXEMPTIONS OF LEGISLATORS. — That no member of the legislature shall be held to answer before any other tribunal for any words uttered in the exercise of his legislative functions. That the members of the legislature shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during their attendance upon the sessions of the respective houses, and in going to and returning from the same: *Provided*, That such privilege as to going and returning shall not cover a period of more than ten days each way, except in the second division, when it shall extend to twenty days each way, and the fourth division to fifteen days each way.

SEC. 13. PASSAGE OF LAWS.—That a bill in order to become a law shall have three separate readings in each house, the final passage of which in each house shall be by a majority vote of all the members to which such house is entitled, taken by ayes and noes, and entered upon its journal. That every bill, when passed by the house in which it originated or in which amendments thereto shall have originated, shall immediately be enrolled and certified by the presiding officer and the clerk and sent to the other house for consideration.

SEC. 14. THE VETO POWER.—That, except as herein provided, all bills passed by the legislature shall, in order to be valid, be signed by the governor. That every bill which shall have passed the legislature shall be certified by the presiding officers and clerks of both houses, and shall thereupon be presented to the governor. If he approves it, he shall sign it and it shall become a law at the expiration of ninety days thereafter, unless sooner given effect by a two-thirds vote of said legislature. If the governor does not approve such bill, he may return it, with his objections, to the legislature. He may veto any specific item or items in any bill which appropriates money for specific purposes, but shall veto other bills, if at all, only as a whole. That upon the receipt of a veto message from the governor each house of the legislature shall enter the same at large upon its journal and proceed to reconsider such bill, or part of a bill, and again vote upon it by ayes and noes

which shall be entered upon its journal. If, after such reconsideration, such bill or part of a bill shall be approved by a two-thirds vote of all the members to which each house is entitled, it shall thereby become a law. That if the governor neither signs nor vetoes a bill within three days (Sundays excepted) after it is delivered to him, it shall become a law without his signature, unless the legislature adjourns sine die prior to the expiration of such three days. If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislature, by its adjournment, prevents the return of the bill, in which case it shall not be a law.

SEC. 15. PAYMENT OF LEGISLATIVE EXPENSES.—That their shall be annually appropriated by Congress a sum sufficient to pay the salaries of members and authorized employees of the Legislature of Alaska, the printing of the laws, and other incidental expenses thereof; the said sums shall be disbursed by the Governor of Alaska, under sole instructions from the Secretary of the Treasury, and he shall account quarterly to the Secretary for the manner in which the said funds shall have been expended; and no expenditure, to be paid out of money appropriated by Congress, shall be made by the governor or by the legislature for objects not authorized by the Acts of Congress making the appropriations, nor beyond the sums thus appropriated for such objects.



SEC. 16. LAWS TRANSMITTED TO PRESIDENT AND PRINTED.—That the Governor of Alaska shall, within ninety days after the close of each session of the Legislature of the Territory of Alaska, transmit a correct copy of all the laws and resolutions passed by the said legislature, certified to by the secretary of the Territory, with the seal of the Territory attached; one copy to the President of the United States; and one to the Secretary of State of the United States; and the legislature shall make provisions for printing the session laws and resolutions within ninety days after the close of each session and for their distribution to public officials and sale to the people of the Territory.

SEC. 17. ELECTION OF DELEGATES.—That after the year nineteen hundred and twelve the election for Delegate from the Territory of Alaska, provided by "An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska," approved May seventh, nineteen hundred and six, shall be held on the Tuesday after the first Monday in November, in the year nineteen hundred and fourteen, and every second year thereafter on the said Tuesday next after the first Monday in November, and all of the provisions of the aforesaid Act shall continue to be in full force and effect and shall apply to the said election in every respect as is now provided for the election to be held in the month of August therein: *Provided*, That the time for holding an election in said Territory for Delegate in



Alaska to the House of Representatives to fill a vacancy, whether such vacancy is caused by failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by an act passed by the Legislature of the Territory of Alaska: *Provided further*, That when such election is held it shall be governed in every respect by the laws passed by Congress governing such election.

SEC. 18. CREATING RAILROAD COMMISSION.— That an officer of the Engineer Corps of the United States Army, a geologist in charge of the Alaska surveys, an officer in the Engineer Corps of the United States Navy, and a civil engineer who has had practical experience in railroad construction and has not been connected with any railroad enterprise in said Territory be appointed by the President as a commissions hereby authorized and instructed to conduct an examination into the transportation question in the Territory of Alaska; to examine railroad routes from the seaboard to the coal fields and to the interior and navigable waterways; to secure surveys and other information with respect to railroads, including cost of construction and operation; to obtain information in respect to the coal fields and their proximity to railroad routes; and to make report of the facts to Congress on or before the first day of December, nineteen hundred and twelve, or as soon thereafter as may be practicable, together with their conclusions and recommendations in respect to the

best and most available routes for railroads in Alaska which will develop the country and the resources thereof for the use of the people of the United States: *Provided further*, That the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated to defray the expenses of said commission.

SEC. 19. That the Committee on Territories of the Senate and the Committee on Territories of the House of Representatives are hereby authorized, empowered, and directed to jointly codify, compile, publish, and annotate all the laws of the United States applicable to the Territory of Alaska, and said committees are jointly authorized to employ such assistance as may be necessary for that purpose; and the sum of five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to cover the expenses of said work, which shall be paid upon vouchers properly signed and approved by the chairman of said committees.

SEC. 20. LAWS SHALL BE SUBMITTED TO CONGRESS.—That all laws passed by the Legislature of the Territory of Alaska shall be submitted to the Congress by the President of the United States, and, if disapproved by Congress, they shall be null and of no effect.

Approved, August 24, 1912.

On the 1st day of May, 1913, the Territorial Legislature for the Territory of Alaska passed an Act, which is as follows: (The pertinent portions are in italics.)

## CHAPTER 52.

(H. B. No. 96.)

*AN ACT to establish a system of taxation, Create Revenue, and Provide for Collection Thereof for the Territory of Alaska, and for other Purposes.*

*Be it enacted by the Legislature of the Territory of Alaska:*

*Section 1. That any person or persons, corporation, or company prosecuting or attempting to prosecute any of the following lines of business within the Territory of Alaska, shall first apply for and obtain license so to do from the district court or subdivision thereof in said Territory, and pay for said license for the respective lines of business and trades, as follows, to-wit:*

Fisheries: Salmon canneries, seven cents per case on sock-eye and king salmon; one half cent a case on hump-back, coho, or chum salmon.

Cold Storage Fish Plants: Doing a business of one hundred thousand dollars per annum, five hundred dollars per annum; doing a business of seventy-five thousand dollars per annum, three hundred and seventy five dollars per annum; doing a business of

fifty thousand dollars per annum, two hundred and fifty dollars per annum; doing a business of twenty-five thousand dollars per annum, one hundred and twenty-five dollars per annum; doing a business of ten thousand dollars per annum, fifty dollars per annum; doing a business of under ten thousand dollars per annum, twenty-five dollars per annum; doing a business of under four thousand dollars per annum, ten dollars per annum. The annual business of this section shall be considered the amount paid per annum for the product.

Laundries doing a business of more than five thousand dollars per annum, twenty-five dollars.

Meat Markets: Doing a business of more than five thousand dollars per annum and less than ten thousand dollars per annum, twenty-five dollars per annum; doing a business of more than ten thousand dollars per annum, fifty dollars per annum; doing a business of more than fifty thousand dollars per annum, seventy-five dollars per annum; doing a business of more than seventy-five thousand dollars per annum, three hundred and seventy-five dollars per annum; doing a business of more than one hundred thousand dollars per annum, five hundred dollars per annum.

Furs: One-half of one per cent. of the gross value of any furs, the product of Alaska, exported from the Territory and it shall be unlawful and punishable under this act for any person to ship from the Territory of Alaska any furs without having first



paid for and obtained a license permit as herein provided; and no custom officer shall issue a manifest for nor postmaster receipt for mailing any furs unless the shipper thereof shall present a certificate for this license fee signed by the clerk of the district court of the division in which the furs were shipped.

Telephone Companies: Doing a business of more than twenty-four hundred dollars per annum, one-half of one per cent. of the gross volume of business per annum over and above the sum of twenty-four hundred dollars.

Transient and Itinerant Merchants, two hundred dollars per annum.

*Mining: One-half of one per cent. on net income over and above five thousand dollars per annum.*

Insurance Companies: A tax shall be imposed on all premiums payable on risks in the Territory of Alaska of one per cent. of the amount of such premiums.

1. In the case of such insurance premiums being paid to companies not licensed to do business in the Territory of Alaska, mutual's or Lloyd's, such tax shall be payable by the insured;

2. In case of premiums paid to companies licensed and doing business in the Territory of Alaska; such tax shall be payable by the company receiving the same.

Express Companies: Express companies to pay one per cent. of the business done by said express



companies in the Territory of Alaska per annum.

Lighterage Companies: Ten cents per ton on freight handled or lightered.

Public Messengers, twenty-five dollars per annum.

Public Scavengers, fifty dollars per annum.

Lodging Houses, ten dollars per annum.

Reindeer owned by white men, twenty-five cents per head per annum.

Fishing Vessels: Fishing vessels propelled by mechanical power of over thirty tons net and plying or fishing in the waters of Alaska, one dollar per ton per annum on net tonnage, custom house measurement, of each vessel.

Transportation: On every ton of freight shipped into or from the Territory of Alaska by any transportation company or steamship line, per annum, payable through the custom house at time of entry to be paid into the Territorial Treasury, ten cents per ton, except return shipments of casks, tanks, kegs, carboys or other receptacles used in the shipment of liquids.

*Sec. 2. That the licenses provided for in this act shall be issued by the clerk of the district court or any subdivision thereof in compliance with the order of the court or judge thereof duly made and entered; and the clerk of the court shall keep a full record of all applications for license and of all recommendations for and remonstrances against the granting of licenses and the action of the court thereon: Provid-*

ed, That the clerk of said court in each division thereof shall give bond or bonds in such amount as the Treasurer of the Territory may require and in such form as the governor may approve, the premium on said bond to be paid from any funds in the Treasury of the Territory of Alaska not otherwise appropriated, and all moneys received for licenses by any clerk of a district court in this Territory under this act, except the moneys derived from fisheries, (one-half of which amount shall be paid by the clerk into the Territorial Treasury to be made available for the propagation and preservation of salmon and other fish in the Territory of Alaska and to be expended under the direction of the United States Bureau of Fisheries) shall, except as otherwise provided by law, be covered into the Treasury of the Territory of Alaska, under such rules and regulations as the Territorial Treasurer may prescribe.

*Sec. 3. That any person, corporation or company doing or attempting to do business in violation of the provisions of this act, or without first having paid the license therein required, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined, for the first offense, in a sum equal to the license required for the business, trade or occupation; and for the second offense, fine equal to double amount of the license required; and for the third offense, three times the license required and imprisonment for not less than thirty days nor more than six months; Provided, That each day business*

*is done or attempted to be done in violation of this act shall constitute a separate and distinct offense; Provided further, That in all prosecutions under this act the costs shall be assessed against any person, firm or corporation convicted of violations hereof, in addition to the fine or penalty imposed, and for failure to pay such fine and costs such person, firm or corporation may be imprisoned, in the discretion of the court, at the rate of one day for every two dollars of said fine and costs; Provided further, however, that in the event of any person, firm, or corporation shall fail to pay the license required by the provisions of this act and shall further fail to pay any fine that may be imposed by a court of competent jurisdiction, for such failure to so pay said license fee or tax required by the provisions of this act, judgment may be entered against such firm, person, or corporation and process shall be issued for the enforcement of the collection of said judgment and in the same manner as judgments in civil proceedings.*

Sec. 4. All United States marshals and their deputies as ex-officio constables, United States fish commissioners and their deputies, in the Territory of Alaska are hereby made license inspectors under this act and shall have power and authority to go upon premises and examine the books, papers, bills of lading, and all other documents bearing upon any matters provided for in this act, of any person, firm, or corporation whom they have reasonable grounds

to believe is evading this act; and if any States Marshal, or his deputy, United States fish commissioner or his deputy, as ex-officio constables shall find any person, firm, or corporation violating this act, or any provision thereof, it shall be the duty of said deputy marshal to go before a United States commissioner, file a complaint in writing charging the person, firm or corporation so violating this act with a misdemeanor, as provided herein, and upon obtaining a warrant upon said complaint to arrest the said person, firm, or corporation and take him or them before the United States commissioner issuing the warrant, for trial.

The Territorial Legislature for Alaska, during the year 1915, passed an Act known as Chapter 76, sections four and seven, of which, respectively, read as follows:

“Section 4. Special remedies provided by this Act, or other Acts of the Legislature shall not be deemed exclusive, and any appropriate remedy either civil or criminal, or both, may be invoked by the Territory in the collection of all taxes, and in civil actions the same penalties may be collected, as are herein provided in criminal actions.

Section 7. The Act of which this Act is an amendment is hereby repealed, except in so far as the same is hereby re-enacted, but nothing herein contained shall be construed to relieve any person, firm or corporation from the payment of any tax, penalty and interest accrued and owing under the



Act of which this Act is an amendment, but all such taxes, penalties and interest shall be paid, or collected and enforced in the same manner as taxes herein provided for are collected and enforced."

The Second Session of the Legislature, which passed Chapter 76, Session Laws of Alaska, 1915, convened on the 1st day of March, 1915, at twelve o'clock noon, and on the 29th day of April, 1915, adjourned, sine die, at twelve o'clock midnight, according to the official time pieces of the Legislature. That is to say, the clocks hanging in the halls of the two houses of the Legislature were stopped or turned back by the Sargeant at Arms, just prior to the hour of twelve o'clock midnight of April 29, 1915, and thereafter between the hours of three and four o'clock A. M., sun time, of April 30, 1915, while the clocks in the halls of the Legislature still indicated an hour prior to midnight, the same having been stopped or turned back to so indicate, Chapter 76 of the Session Laws of 1915 was finally passed by both houses of the Legislature, and approved by the Governor and enrolled and filed in the office of the Secretary of State for the Territory.

The Alaska Mexican Gold Mining Company, plaintiff in error, is a corporation owning several mining claims situate on Douglas Island, in the Territory of Alaska. These mining claims contain gold mines which were operated and worked by the plaintiff in error during the years 1913 and 1914. The net income resulting from such operations between



July 31, 1913, and January 1, 1914, amounted to \$57,572.43, and the net income resulting from such operations during the calendar year of 1914 amounted to \$114,953.49.

The plaintiff in error during all the time that its mines were so operated by it paid a tax of three dollars per annum for each of its one hundred and twenty (120) stamps, as required by an Act of Congress in force in the Territory, but did not apply for a license under the Act of the Territorial Legislature, above set forth, either during the year 1913 or the year 1914, and did not receive a license under the provisions of said act, or otherwise, for or during either of said years to carry on the business of mining, or any other license whatsoever, and did not pay to the Territory of Alaska for a license, or otherwise, the sum of one-half of one per cent, or any other sum whatsoever, on its net income, or otherwise, under or in compliance with the provisions of the last mentioned act.

The Territory made demand on the plaintiff in error for the payment of \$287.86, with legal interest thereon from January 15, 1914, claimed to be due it as taxes for the year 1914, and also made demand on the plaintiff in error for the sum of \$574.76, with legal interest thereon from January 15, 1915, claimed to be due it as taxes for the year 1914.

All facts as above narrated were agreed to by the parties (see Record pages 2, 3, 4, and 5.) Upon the facts so agreed to, the cause was submitted to

the trial court for decision, the various contentions of the parties hereinafter discussed, having been set out at length in the agreed case. (See Record page 5 et seq.) Whereupon the Court entered judgment for the Territory in the sum demanded, to wit, the sum of \$862.61. Proper exceptions having been taken, the case was taken on Writ of Error to this Court.

### ERRORS ASSIGNED AND RELIED ON FOR REVERSAL.

#### First Error Assigned.

That the court erred upon the submission of the cause to it on the agreed statement of facts in not concluding that the defendant was not indebted to the plaintiff in the sum demanded, or in any sum whatsoever, and entering judgment in favor of the defendant accordingly as it was requested to do by the defendant at the time the cause was submitted.

#### Second Error Assigned.

The Court erred in adopting as its conclusion, conclusion of law number one, contained in the judgment, "That the defendant is liable for the license tax laid by the Territory of Alaska in Chapter 52 of the Session Laws of 1913."

#### Third Error Assigned.

The Court erred in adopting as its conclusion, conclusion of law number two, embodied in the judgment, which reads as follows: "That the tax so due may be recovered in a civil action under the provisions of Chapter 76, Session Laws of Alaska, 1915."

### Fourth Error Assigned.

The Court erred in entering judgment for the plaintiff and against the defendant.

### ARGUMENT.

The four errors assigned are such that they raise practically the same questions, and can therefore be most conveniently discussed together. The first question presented is whether or not the Act of the Territorial Legislature, which forms the basis of this action, creates any civil liability. The second question is whether this act, taken in connection with the subsequent act passed in 1915, gives any civil remedy, and the third question relates to the validity of the act of the Territorial Legislature, upon which this action is predicated. These will be discussed in their order.

#### I.

### THE ACT OF THE TERRITORIAL LEGISLATURE CREATES NO CIVIL LIABILITY.

The act of the Territorial Legislature provides:

“Sec. 1. That any person or persons, corporation, or company prosecuting or attempting to prosecute any of the following lines of business within the Territory of Alaska, shall first apply for and obtain license so to do from the district court or subdivision thereof in said Territory, and pay for said license for the respective lines of business and trades, as follows, to-wit:”

“Mining: One-half of one per cent. on net income over and above five thousand dollars per annum.”

“Sec. 2. That the licenses provided for in this act shall be issued by the clerk of the district court or any subdivision thereof in compliance with the order of the court or judge thereof duly made and entered; and the clerk of the court shall keep a full record of all application for license and of all recommendations for and remonstrances against the granting of licenses and the action of the court thereon.” \* \* \* \* \*

“Sec. 3. That any person, corporation or company doing or attempting to do business in violation of the provisions of this act, or without first having paid the license therein required, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined, for the first offense, in a sum equal to the license required for the business, trade or occupation; and for the second offense, fine equal to double amount of the license required; and for the third offense, three times the license required and imprisonment for not less than thirty days nor more than six months; Provided, that each day business is done or attempted to be done in violation of this act shall constitute a separate and distinct offense; Provided, further, that in all prosecutions under this act the costs shall be assessed against any person, firm or corporation convicted of violations hereof, in addition to the fine or penalty imposed, and for failure



to pay such fine and costs such person, firm or corporation may be imprisoned, in the discretion of the court, at the rate of one day for every two dollars of said fine and costs; Provided, further, however, that in the event of any person, firm, or corporation shall fail to pay the license required by the provisions of this act and shall further fail to pay any fine that may be imposed by a court of competent jurisdiction, for such failure to so pay said license fee or tax required by the provisions of this act, judgment may be entered against such firm, person, or corporation and process shall be issued for the enforcement of the collection of said judgment and in the same manner as judgments in civil proceedings."

It will be observed that under the provisions of this act it is made an offense to carry on the business of mining without first applying for and obtaining a license as in the act provided. Each day during which the business is conducted is made a separate offense. For the first offense the fine is the amount of the license. For the second offense the fine is double the amount of the license. For the third offense the fine is three times the amount of the license together with imprisonment as in the act provided. Upon a conviction the court is authorized to impose a penalty and the fine having been assessed, after conviction had, and the defendant having failed to pay the same, the court may imprison the defendant as in the act provided, and may also enter judgment against such defendant for the amount of the fine



imposed and this judgment may be collected as other judgments. Nowhere is there any provision in the act providing that the person, firm, or corporation conducting business in violation of its provisions shall become indebted to the Territory in any sum whatsoever. The act is purely penal in its nature. It provides that the doing of certain things shall constitute an offense. It provides the penalty to be imposed after conviction and the manner in which the payment of this penalty, when imposed after conviction duly had, may be enforced.

The offense created consists in doing business without first having obtained the license. And this license can not be obtained simply by paying for it, but an application must first be made to the Court or Judge. This application is filed with the Clerk, together with the recommendations for the granting of the license and remonstrances against it. The application, together with these recommendations and remonstrances, are then submitted to the Court or Judge, who then makes an order either granting or refusing the license. If the Court orders the license granted, the Clerk issues it upon the payment of the sum specified.

This act differs very widely from the ordinary act providing for privilege or occupation taxes. Under the ordinary license tax act, the license issued serves no purpose except that of a receipt for the license tax paid. But under this act, the license is a privilege that may be either granted or withheld,

depending upon the view that the Court or Judge may take of the matter after considering the recommendations for and the remonstrances against the granting of the license. The language of the act in this regard is the same as, and was evidently copied from the provisions in the Alaska Code relating to the sale of intoxicating liquors, as found in Section 2572, of the Compiled Laws of Alaska. The language found in the Act of Congress referred to is as follows: "That the liecnses provided for in this act shall be issued by the Clerk of the District Court or any subdivision thereof in compliance with an order of the court or judge thereof duly made and entered, and the Clerk of the Court shall keep a full record of all applications for licenses and of all recommendations for and remonstrances against the granting of licenses and of the action of the court thereon."

It will be observed that Section 2 of the Act of the Territorial Legislature is a verbatim copy of the section just quoted. The only distinction between the Act of Congress and the act of the Territorial Legislature being that the act of Congress by subsequent provision provides under what circumstances the court or judge shall, and under what circumstances he shall not grant the license. This provision is omitted from the Alaska Act, so that under it the action of the Court or Judge in granting or refusing a license is purely arbitrary, and is based upon nothing except the remonstrances

and recommendations filed with the application and submitted to him therewith. This matter will be fully discussed when the effect of this provision upon the validity of the act is considered.

Attention is called to it at the present time to point out that the offense for which the penalty is provided does not consist in a failure to pay the license fee prescribed, and that the liability following the commission of the offense could not be avoided by paying it. Suppose the tax had been paid as required, and the application presented to the court with such recommendations as the applicant might be able to obtain, the remonstrances filed in opposition to the granting of the license might outweigh the recommendations, and the court might for this or for some other reason, deny the applicant's application and refuse to make an order allowing the granting of the license. The payment of the money would in that case not serve as any protection. The applicant would still be guilty of the offense prescribed, if he persisted in conducting his business after the court had denied him a license. The case falls squarely within the reasoning employed by this court in the case of *United States vs. Jorden*, 193 Fed. 986. In that case, a civil proceedings was instituted to recover the wholesale fee of a retailer of intoxicating liquors, who was selling at wholesale in violation of the law. The proceeding was instituted under the Act of Congress in force in Alaska, relating to licenses for the sale of intoxicating liquors, which

as has already been pointed out, is in respect to the matters above referred to identical in terms with the act of the Territorial Legislature now before the Court, the latter being evidently copied from the former. The exact question decided in that case was that a civil action could not be brought to recover the license fee in a case where the defendant had violated the law. But the court in passing upon that matter clearly pointed out the reason why a civil liability did not exist in cases of that character. The court say:

“The case at bar is unlike that of *United States vs. Chamberlain*, 219, U. S. 250, 31 Sup. Ct. 155, 55 L. Ed. 204, in which it was held that an action would lie by the United States to recover the amount of a stamp tax payable under the war revenue act of June 13, 1898, upon the execution of a conveyance. The present action is not one to recover a tax imposed upon the performance of an act which all persons are permitted to perform, and which in itself is not in any way regulated or restricted, but it is an attempt to recover a fee which the law prescribed as one of the conditions upon which might be obtained the permission to engage in a specified business which is declared by law to be unlawful without that license. The fee is not a tax imposed upon the business of selling liquor. The statutes of Alaska do not extend to all persons who are willing to pay the license fee permission to engage in the business of selling liquor. The privilege is hedged about



with restrictions and conditions, one of which is that the majority of the residents of the vicinage shall consent to the issuance of the license. Nor do the statutes confer upon the district attorney the power to legalize an illegal traffic, and to declare that, after the law has been broken, the lawbreaker shall pay the government the license for doing that for which no license has been given. The defendant in error is not indebted to the government. He has not complied with the terms upon which he could acquire the right to conduct a wholesale liquor business. He has conducted an illegal business, and has done acts prohibited by law—and for those acts the statutes prescribe but one remedy — the criminal prosecution and punishment of the offender. Of such an offender it was said in *State v. Adler*, *supra*:

‘ “He is a violator of the law, and as such is liable to fine and imprisonment for his offense. But the offense is not that he has failed to pay a sum as taxes on the business transacted, or even that he has conducted the business without payment of the license tax. Payment of the sums fixed as the price of the license would not of itself have legalized the business. Compliance with all the other numerous provisions of the statute would be required to render it legal.” ’

So also in the case of *State v. Adler*, 9 So. Rep. 674, referred to by this court in the opinion above referred to, the distinction between a license tax due



under a law where the license issues as a matter of course upon the payment of the money and an amount required in connection with the issuance of a license which does not issue as a matter of course, is clearly pointed out. In the last mentioned case, the court say:

“The argument for appellant is that one who has failed to return his property for assessment owes the state, as a delinquent tax-payer, the tax which would have been assessed against it if returned, and, followed to its logical conclusion, would embrace the right of the revenue agent to sue for a fine which one guilty of assault and battery ought under the law be required to pay upon conviction of the offense; for taxes upon unassessed property are no more due and delinquent than is the unimposed fine of the actually guilty but unconvicted violator of the criminal law.”

## II.

### THE LAWS OF ALASKA DO NOT PROVIDE FOR A CIVIL REMEDY FOR THE COL- LECTION OF THE AMOUNT SUED FOR.

The act of the First Territorial Legislature nowhere provides for its enforcement in a civil proceeding. In that respect, it is altogether similar to the Congressional Acts before this court in the case *United States v. Jorden*, 193, Fed. 986, and the case of the *United States v. Northwestern Development*

Company, 203 Fed. 961, also decided by this court. The decision in the latter case relates to the right of the government to collect by a civil proceeding a license tax due under the Congressional Act in force in the Territory, exacting license taxes from those engaged in business and trade. This Act, like the present Act, provided for no civil remedy, and the court held that the criminal remedy especially provided was exclusive.

It is urged, however, that the Territory is given a civil remedy because of the provisions in the Act of 1915, above referred to. That Act in terms repeals the act of 1913, but contains the proviso that nothing therein contained shall be construed to relieve any person, firm or corporation from the payment of any tax, penalty and interest accrued and owing under the former act, but it is provided that such tax, penalty and interest shall be paid or collected and enforced in the same manner as taxes under the Act of 1915 are collected and enforced. And a previous section provides that taxes under the latter act may be enforced by resort to any appropriate remedy, either civil or criminal.

The difficulty, however, is that, as has already been pointed out, no tax, penalty or interest is or can be owing under the provisions of the Act of 1913, until after a conviction has been had, and since no conviction has been had there is nothing owing for which the present action can be maintained. Nor can the Act of 1915 supplement the Act of

1913 in this regard, for if the former act be so construed as to create an obligation not existing under the latter, it would be retroactive in its provisions, and for that reason void.

And while it may be conceded that the inhibition against retroactive legislation does not apply to laws that relate purely to the remedy, it does not follow that a law providing that a civil suit may take the place of a criminal prosecution in the assessment and collection of fines due under a penal law would be valid. Such an act does not relate purely to the remedy, but creates a civil liability where none existed before. To use the illustration employed by the Supreme Court of Mississippi in the case above referred to: If such an act were held valid it would be equivalent to saying that a law could be passed providing for the collection of a fine imposed by law on one committing the crime of assault and battery.

In addition to creating a civil liability where none existed before, such an act would deprive one charged with crime of all the safeguards provided by our Constitution and laws in connection with the enforcement of criminal statutes. If a civil remedy could be substituted for one in accordance with criminal procedure, a person violating a criminal statute could be compelled to be a witness against himself and be convicted and compelled to pay the penalty imposed without enjoying the right of a speedy and public trial before an impartial jury, as provided by the Constitution, without being informed of the na-

ture and cause of the accusation, without being confronted with the witnesses against him, and without having compulsory process for obtaining witnesses in his favor, and without having the assistance of counsel. An act of this character therefore can hardly be said to belong to that class which do not come within the inhibition against retroactive and ex post facto laws.

Even if the provisions contained in the Act of 1915 had originally been enacted as a part of the Act of 1913, a civil proceeding could not be brought to collect a fine. To do so would be to deprive the accused of the constitutional rights above referred to; and the provisions so inserted in the act authorizing any such proceeding would be void, because obnoxious to Articles V and VI of the Constitution.

### III.

#### THE VALIDITY OF THE ACT PASSED BY THE TERRITORIAL LEGISLATURE WHICH FORMS THE BASIS OF THIS PROCEEDING.

The Act of the Territorial Legislature is invalid for three reasons: First, it requires the doing of that which is impossible, and is so indefinite and uncertain in its provisions that it can not be enforced. Second, it violates the provisions of the Federal Constitution. Third, it violates the provisions of the Organic Act. These will be discussed in their order.



A. It Requires the Doing of that which is impossible and is so uncertain and indefinite in its provisions that it cannot be enforced.

The Act provides, that any one engaging in the business of mining, without first obtaining and paying for a license so to do a sum equal to one-half of one per cent on his net income, over and above five thousand dollars, shall be guilty of a misdemeanor; that each day he carries on such business or attempts to do so without paying for and obtaining a license, he commits a separate and distinct offense; that for the first offense he shall be fined upon conviction a sum equal to the amount of the license. For the second offense, he shall be fined double the amount of the license, and for the third offense he shall be fined three times the amount of the license, and in addition thereto shall be imprisoned for not less than thirty days, nor more than six months.

Section 3 provides in express terms that the amount of the license tax must be paid in advance. It will be observed that the amount that must be so paid for the license is one-half of one per cent on the net income, over and above five thousand dollars per annum. Under this provision, therefore, one engaged in the business of mining is required to predict in advance the amount of his net income for the coming year, and pay to the Territory one-half of one per cent on the amount of such net income in excess of five thousand dollars. That this cannot be done is obvious.



Under this provision, one engaged in mining in Alaska can never tell whether his conduct is or is not going to subject him to criminal prosecution until he has persisted in it for a period of a whole year. He is indeed fortunate if he finds at the close of a year's operations that he has operated at a loss, or that his income does not exceed five thousand dollars, for in that case he can at least not be subjected to fine and imprisonment. If his fondest hopes have been realized and he finds at the close of a year's business that he has made a profit in excess of five thousand dollars, he has committed three hundred and sixty-five (365) offenses during the course of the year, with one additional, if the year happens to be Leap Year. For the first of these offenses, he is subject to a fine equal to one-half of one per cent of his net income, in excess of five thousand dollars. For the second of these, he is subject to a fine in double this amount. For the third of these, he is subject to a fine in three times this amount, and in addition to this, is required to be imprisoned not less than thirty days, nor more than six months. If the court did its full duty in imposing all the cumulative sentences provided for under this Act, the fines would many times exceed his income, and no ordinary man could ever hope to live long enough to serve his sentence out.

Some difficulties also would be encountered in attempting to enforce this law. If a lawless person engaged in mining without first obtaining and pay-

ing for a license should be indicted and brought to trial, the prosecution of course would be called upon to prove what his net income for the year was going to be. For without this proof, it would be impossible to tell whether the alleged offender had in fact committed a crime. The Delphian Oracle could not be consulted, for the stupefied priestess would be aroused from her stupor long before she could be transported to far away Alaska, and it is only those utterances that come from her lips immediately upon being aroused that can be relied upon. And this journey could not be avoided, as the defendant in a criminal prosecution has a right to be confronted with the witnesses against him. Nor would the situation be measurably relieved if the culprit should plead guilty, for then the court would be required to impose sentence, and the penalty to be imposed is in each case made to depend upon the amount of the license, which in turn must be calculated upon an income, the amount of which is unknown.

It requires neither argument nor citation of authorities to show that this law can neither be complied with nor enforced.

There is, however, still another reason why this law could not be complied with by the plaintiff in error. The Act provides that the amount of the license tax shall be paid to the Clerk of the court. No other person is authorized by the Act to receive it, and under a decision by this court the Clerk of the court was not authorized under the Organic Act to act for

the Territory in this regard, he being an officer of the Federal Government.

*Callahan vs. Marshal*, 210 Fed. 231.

In addition to this, it was stipulated that the Clerk never qualified to act under the Territorial Law. (See Rec. Page 4.)

B. It violates the provisions of the Federal Constitution.

The Act of the Territorial Legislature violates the provisions of the Fourteenth Amendment of the Constitution of the United States in two respects: First, it confers upon the court or judge the power to deprive the plaintiff in error of its property arbitrarily and capriciously; and Second, it exacts from the plaintiff in error a tax which is not exacted from others similarly situated.

B 1. It confers upon the court or judge the power to deprive the plaintiff in error of its property arbitrarily and capriciously.

The Act of the Territorial Legislature provides as follows: "That the licenses provided for in this Act shall be issued by the Clerk of the District Court or any subdivision thereof in compliance with the order of the Court or Judge thereof duly made and entered, and the Clerk of the Court shall keep a full record of all applications for licenses and of all recommendations for and remonstrances against the granting of licenses, and the action of the court thereon." No conditions whatsoever were prescribed in the Act, a compliance with which would entitle

an applicant to a license, but the whole matter was left to the arbitrary will of the court or judge.

The court or judge, under this provision, passes upon an application for a license, and either grants or refuses it, as the case may be, with nothing before him except the recommendations for and the remonstrances against the granting of the license filed with the application. These recommendations may be used upon any ground whatsoever, and this is also true of the remonstrances. Yet it is upon these, together with the application, that the court is required to base its action.

Under this law, the court or judge is endowed with absolute power from which no appeal lies to grant or refuse a license to one following an occupation useful and necessary to society, and to deny an owner of property the right to use his property in all cases where a license is required in connection with such use. Since in acting upon an application the court or judge has nothing before him except the application and the recommendations and remonstrances based upon such grounds as may seem proper to the recommenders and remonstrators, he has nothing to guide him except his caprice and nothing to control him except his arbitrary will.

Nor is this arbitrary power to be exerted in connection with the regulation of those occupations which are liable to endanger the public health or public morals or the good order of society, so that their exercise might in proper cases require police



regulation. But the court or judge may, under this act, deny to anyone the right to carry on those useful and necessary occupations upon which the well being of society depends. Included among the industries that cannot be carried on without the permission of the court or judge, granted in the form of a license, are mining and fishing. Not only do the mines and the fisheries lie at the foundation of all industrial prosperity in Alaska, but their products add to the comfort and well being of the whole race. The former fill the arteries of trade with gold, the latter supply a cheap food product that can nowhere be excelled. Yet under this remarkable act, the court or judge is empowered to shut down every mine and every fishery without offering any reason or excuse for so doing.

In the case of those occupations which are considered harmful in themselves, unless controlled and regulated under the police power, it is often essential that the person pursuing such occupations be of good moral character, or that some other suitable condition be complied with, and the question of whether the applicant has a good moral character, or has complied with the requisite conditions, must of course be passed upon by the court, judge or other board or tribunal issuing the license, but even in those cases arbitrary power to grant or refuse a license can not be lodged in any tribunal. A tribunal may be empowered to determine the question of whether or not the conditions prescribed have been complied



with, but it can not be empowered, even in those cases, to grant a license to one and to refuse it to another just because caprice or other similar consideration may dictate that this should be done. This might have been well enough during those primitive times when those subject to established governments were governed by men. But such power can not exist where government by law prevails, and this would be so independent of the constitutional guarantees upon the subject.

In Alaska some concerns engaged in mining and fishing have invested many millions of dollars, yet under this law they are required to make an application to the court or judge for permission to carry on the enterprises in connection with which these investments are made. Nothing in the world that these concerns can do will place them where they can demand a license as a matter of right. Their friends can recommend and their enemies can remonstrate; if the court or judge grants the license it comes as a gracious favor; if it is refused the applicant has not even the right of appeal.

It is stipulated in this case that the plaintiff in error is the owner of a number of mining claims containing valuable mines. The right of property of course carries with it the right to its free use and enjoyment, a denial of the right to use property is clearly an invasion of the right of property itself. This law, therefore, not only confers upon the court or judge arbitrary power to deny to those engag-

ed in mining the right of following a useful and commendable occupation, and in that manner invades the right of property, for these occupations are property within the meaning of the provisions of the constitution, but it deprives the plaintiff in error of property for the further reason that it is denied the right to operate its mines without the permission of the court or judge.

This law violates all the provisions contained in the first section of the Fourteenth Amendment. It abridges the privileges and immunities of citizens of the United States. It deprives persons of property without due process and denies to those within the jurisdiction of the Territory the equal protection of the laws.

A case in all respects like the one at bar was before the Supreme Court of the United States, where it was held that such legislation could not be sustained. *Yick Wo v. Hopkins*, 118 U. S. 356. An ordinance had been passed by the City of San Francisco, providing that it should be unlawful for any one to conduct a laundry in a wooden building, without a permit obtained from the Board of Supervisors. The ordinance contained no regulatory provisions, but it was contended that it might be sustained as a valid exercise of the police power, because it referred to wooden buildings, which were more liable to take fire if used for laundry purposes than buildings of brick or stone. And the Supreme Court of California took this view of it. The Su-

preme Court of the United States, however, held that the ordinance could not be sustained, either as an exercise of the police power, or otherwise. In speaking of the ordinance, the court say:

“The ordinance drawn in question in the present case is of a very different character. It does not prescribe a rule and conditions, for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows, without restriction, the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this: that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is

submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature."

And again in the course of the opinion, it is said: "For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

This case being on all fours with the case at bar it is not necessary to cite further authorities upon this subject.

## B-2. IT EXTRACTS FROM PLAINTIFF IN ERROR A TAX NOT EXACTED FROM OTHERS SIMILARLY SITUATED

It will be observed that under the provisions of this law, those engaged in mining are required to pay one-half of one per cent. on their net incomes, provided their net incomes exceed five thousand dollars per annum. This is clearly an income tax. And none except those engaged in mining are required to pay it. Incomes derived from other sources are not taxed. It would be difficult indeed to imagine a reason why a person whose income is derived from mining should be required to pay a tax on such income when all incomes derived from other sources are exempt from taxation. Mining is a useful, lawful and commendable occupation and the income derived therefrom does not differ in character from



the income derived from any other business. This act therefor discriminates against those engaged in mining in favor of those engaged in other pursuits, and denies to the former the equal protection of the laws. Not only this, but it discriminates against those engaged in mining who have an income in excess of five thousand dollars in favor of those similarly engaged, whose income is less than five thousand dollars. The benefit of this exemption extends to persons, firms and corporations alike.

This whole matter was before this court in the case of *Peacock vs. Pratt*, 121 Fed. 272. In that case, the court was called upon to pass upon the validity of an income tax imposed by the Legislature of Hawaii Territory. Under that act, the incomes of certain enumerated religious and charitable institutions were exempt from taxation. The incomes of certain insurance companies were also exempted, but in the case of the insurance companies the act expressly stated the reason for the exemption, that reason being that these insurance companies were subjected to another special tax. Incomes of natural persons to the extent of \$1,000.00 were also exempted. This exemption did not extend to corporations. It was contended that these exemptions resulted in illegal discrimination.

The Organic Act of the Hawaii Territory differs from the Alaska Organic Act in that it imposes no restrictions upon the exercise of the taxing power. The limitations imposed by the Alaska Organic Act



upon the exercise of this power will be more clearly pointed out when the validity of the act before the court is discussed in the light of the Organic Act. For the present, the discussion will be confined to its validity in the light of the Federal Constitution. Since the Organic Act of Hawaii contains no limitations upon the taxing power, the sole question presented before the court was whether the alleged discriminations were such as would render the act void under the provisions of the Fourteenth Amendment. It will be noted that the income tax law then before the court provided for the taxing of all incomes alike, however derived, except in case of the enumerated charitable institutions, and in the single case of the insurance companies.

This court very properly held that a sound public policy required an exemption of the charitable institutions, and that the exemption of the insurance company did not result in any illegal discrimination for the reason that an equivalent tax was imposed upon the insurance companies by another act. A statement containing this reason for exempting the insurance companies being contained in the income tax act itself.

After so deciding, this court layed down the rule governing the questions as to whether a given tax law violates the provisions of the Fourteenth Amendment. The court say: "The rule is that unequal taxes may not be imposed upon property of the

same kind in the same situation and used for the same purpose."

The law passed by the Alaska Legislature singles out for taxation the incomes derived from mines and imposes a tax on no incomes except these. No reason is assigned for so doing. Nor, as has already been pointed out, can any exist. The Alaska law differs from the Hawaii law in that the latter bears upon its face the evidence of fairness and lack of discrimination, while the former is characterized by an utter want of these characteristics. Clearly, under the rule laid down by the court, the singling out of the incomes derived from mines for taxation is an unjust discrimination against those whose incomes are derived from that source.

The five thousand dollar exemption contained in the Alaska Act also differs very widely in character from the thousand dollar exemption contained in the Hawaii law. Under the provisions of the latter law, natural persons only were entitled to this exemption. Such exemptions, as the court well stated, are up-held "on grounds of enlightened public policy—a public policy which seeks to exclude from taxation the living expense of the average family, and thus enable the poor man to escape becoming a public burden." Under the Alaska Act, the exemption is not only five times as large, but extends to persons, firms and corporations alike. Public policy can not require this exemption in the case of firms

and corporatins, for neither of these require living expenses, nor can either become a public burden.

Again, the exemption of five thousand dollars would seem unreasonably large in any case. While it must be conceded that the amount of the exemption must to a large extent be left to the discretion of the Legislature, the power and authority of the Legislature in this regard is not unlimited but must be exercised within the bounds of reason. It would seem that a five thousand dollar exemption is more than is necessary to secure to the average family the means of living. To hold that this is an unreasonable discrimination would be in exact accord with the views expressed by this court in the case of *Peacock vs. Pratt*.

### C. IT VIOLATES THE PROVISIONS OF THE ORGANIC ACT.

The act on its face is a revenue act designed to raise revenue, requiring the payment of a fixed sum in each of the enumerated cases for a license. It is entitled, "An Act to establish a system of taxation, create revenue and provide for collection thereof for the Territory of Alaska and for other purposes." Section One provides, "That any person, or persons, corporation or company, prosecuting or attempting to prosecute any of the following lines of business within the Territory of Alaska shall first apply for and obtain license so to do from the District Court or subdivision thereof in said Territory, and pay for

said license for the respective lines of business and trade, as follows, to-wit: \* \* \* \* \* Mining: one-half of one per cent. on net income over and above five thousand dollars per annum."

In order to consider the validity of the act in so far as it relates to the matters in dispute it is necessary to ascertain the meaning of the language employed, in so far as it relates to such matters. That the sole object of the act is the collection of revenue is not disputed. It is conceded that the amount sued for is sought to be recovered as taxes due under the provisions of the act. It remains to be seen, however, whether the tax sought to be collected is an income tax on the incomes derived from mines or an occupation or business tax generally referred to as a license tax. It is obvious that the tax belongs to one or the other of the two classes named. Its validity will therefor be considered from both view points.

#### (C-1.) VIEWED AS AN INCOME TAX.

Whatever power is possessed by the Territorial Legislature of Alaska is derived from the Organic Act. Congress has under the constitution plenary power to legislate for the territories. It may either exercise this power or it may delegate it in whole or in part to a territorial legislature. In the case of Alaska is has in part only delegated its powers in this regard to the Legislature of the Territory by the Organic Act.



The Organic Act of a territory is a grant of legislative powers. In that respect it does not differ from the charter of a municipal corporation or the constitution of the United States. Such grants are always strictly construed. No power passes except such powers as are either expressly conferred or are conferred by necessary implication. The powers expressly conferred are those that are stated in express terms. The powers conferred by necessary implication are limited to such as may be necessary to carry into effect the powers expressly granted.

Every sovereign power has the inherent right to collect revenues since this right is necessary to its existence. The Territory of Alaska, however, is not a sovereign power so as to be endowed with this inherent right. It is a mere territory of the United States and its legislature is the creature of the Congress; like other legislative bodies similarly created it is endowed with such powers only as are conferred upon it.

The Organic Act contains a provision similar to the general welfare clauses ordinarily contained in the charters of municipal corporations. This provision reads as follows:

“The Legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States.”

Under it the power to raise revenues by means of taxation is in a general way, subject to the limita-



tion elsewhere imposed, conferred; but since legislative grants are strictly construed, the powers thus conferred in a general way must be exercised in strict conformity with the specific requirements of the Organic Act itself and in strict subordination to the limitations imposed.

The organic act contains the following provision: "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof. The tax in question viewed as a tax on the income of mines violates two of these provisions.

In the first place it is not uniform upon the same class of subjects. If the subject of taxation is incomes it will not do to confine the taxation of incomes to those derived from mines, for these do not differ from incomes derived from other sources. Incomes are incomes however derived and if incomes are the subject of taxation, all incomes must of necessity be considered as belonging to the same class. No tax therefor can be uniform upon the same class of subjects if levied on incomes unless all incomes are included regardless of whether they are derived from mining or from some other source.

This act, however, goes further and provides that only such incomes derived from mining as exceed five thousand dollars per annum shall be taxed. This exemption is not to be considered as an exemption dictated by considerations or public policy with

a view of exempting the living expenses of persons engaged in mining, but as an arbitrary discrimination since it applies to persons, firms and corporations alike. Neither reason nor authority would permit the legislature to exempt any part of the incomes of either firms or corporations. This amounts then to a further discrimination against those engaged in mining whose incomes exceed five thousand dollars.

This law viewed as an income tax also violates the provision requiring assessment according to value. No provision is made in the act for any assessment whatsoever. Whereas the Organic Act clearly requires first that an actual assessment be made and second that the assessment so made shall be according to value. The question of whether an actual assessment was required by a provision of ~~the~~ <sup>the</sup> *character* ~~charter~~ was before the Supreme Court of Kentucky in the case of *Levi v. City of Louisville*, 30 S. W. 973. The City of Louisville had adopted an ordinance providing that real estate should be taxed at a fixed per cent as well as personalty not used in connection with trades or business on which a license was paid, but the personalty used in connection with such trades and business should not be subject to a further tax.

The question presented for determination related to the right of the city to substitute as to personalty the license tax for a tax under the ad valorem system, and thus tax personalty without making any

assessment. The constitution of Kentucky contains the following provision, "All property not exempt from taxation by this constitution shall be assessed for taxes at its fair cash value." It also contains a provision providing that nothing in the constitution shall be so construed as to prevent the imposition of license taxes. It was argued that under these constitutional provisions a license tax might be imposed on the personal estate of those engaged in mercantile and business pursuits, and that uniformity and equality in taxation might be reached by a diversity of means as applied to the various kinds of property. But the court held that such a tax could not be sustained; that under the constitutional provision personal property could not be taxed except upon its cash value ascertained by an assessment of the property. The court say: "The power to prescribe the mode of assessment for ascertaining the value of property has been taken from the legislative control and fixed by the constitution so there is nothing left but to follow its provisions and no authority is given the legislature to value or have property valued but in one mode." Further on in the course of the opinion it is said: "Nor do we find in the constitution a provision of any kind conferring on the municipal government the power to assess property for the purpose of revenue by imposing a license tax. Nor has the legislature the power to authorize the imposition of a tax on the amount of

property whether real or personal in any other mode than that prescribed by the Organic Law.”

The provision in the Alaska Organic Act, like that of the constitution of Kentucky requires that there shall be an assessment according to value. No other mode is indicated by which the value can be ascertained except upon an assessment. The case therefore falls squarely within the rule as laid down by the Supreme Court of Kentucky.

Again, even though the act were considered as if an assessment of the income itself had been made without any reference to the property from which such income was derived, so that the income were taxed irrespective of the relation it bore to such property, it would have to be according to actual value. Under the act of the Legislature the first five thousand dollars of actual value is left out of consideration so that the tax is not imposed upon the actual value of the income, but upon the value of the income less five thousand dollars.

An actual assessment of the income resulting from mining and an ad valorem tax based upon an assessment, however would not meet the requirement of the Organic Act that taxation must be according to actual value.

A tax upon incomes is a tax upon the property from which the income is derived. It was so held by the Supreme Court in the case of *Pollock v. Farmers' Loan and Trust Company*, 157 U. S. 429. Under the doctrine laid down by the Supreme Court in that



case, the tax laid upon the income resulting from mining by the Territorial Legislature is a tax upon the mines themselves, and not being assessed according to the actual value of the mines, the tax fails to comply with the provision that taxation must be according to actual value.

In the case of *State v. Cook*, 36 Atl. 892, the Supreme Court of New Jersey had occasion to pass upon the validity of a tax on mines assessed according to their income. The constitution of New Jersey provides that "all property shall be assessed for taxes at its true value." Under this constitutional provision the Supreme Court held that if mines were taxed their actual value must form the basis for taxation, regardless of the income. The court say: "That income is a criterion for valuation for taxation is peculiarly inappropriate to the taxation of mining property, in relation to which each year's income represents to that extent a diminution in the actual intrinsic value of the property."

Nor does the fact that the tax in question is referred to by the Territorial Legislature as a "license tax" in any way alter the situation. The fact that an income tax is called a license tax does not make it such. It has been often held that the character of a tax is not affected or changed by the name given to it. In the case of *Brown vs. Maryland*, 12 Wheat-419, it was held that a tax on the occupation of an importer was the same as a tax on imports and therefore void. In that case Chief Justice Marshall said:



“It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself.”

It was upon the language thus expressed by Chief Justice Marshall that the decision in the case of *Pollock v. Farmers' Loan and Trust Company*, with relation to the matters above referred to, was largely based.

The decision of the Supreme Court in the case of *Brown v. Maryland* was followed by that court in the case of *Welton vs. State*, 91 U. S. 278. The state of Missouri passed a law exacting a license tax from peddlers selling merchandise manufactured outside of the state. This act was held to be an interference with interstate commerce and void. It was urged that the license tax was required from the peddler and was not a duty imposed upon the goods he sold; that the goods were the subject of interstate commerce and not the peddler, that for this reason the license tax did not interfere with interstate commerce, but the court held that a license tax exacted for the sale of goods was in effect a tax upon the goods themselves. In passing upon this question, Mr. Justice Fields, speaking for the Court, says:

“The license charge exacted is sought to be maintained as a tax upon a calling. It was held to

be such a tax by the Supreme Court of the State; a calling, says the court, which is limited to the sale of merchandise not the growth or product of the state.

The general power of the State to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Federal Constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license."

The state courts also have frequently held that the character of a tax is not determined by the name given it. Thus in the case of *Standard Oil Company v. Commonwealth*, 82 S. W. 1020, the Supreme Court of Kentucky had before it an act of the Legislature imposing a license tax of \$10 on all oil deposits. The constitution of Kentucky contained a provision requiring all property taxes to be assessed according to value, but allowing the imposition of license taxes. The question therefor arose whether this was a license tax or a property tax. If a property tax the constitution required it to be according to value. If a

license tax it might stand since the constitution expressly provided that license taxes might be assessed, without regard to this constitutional requirement. The court, however, held that notwithstanding the fact that the tax was called a license tax by the legislature it was a property tax and as such was void because not assessed according to value.

So also in the case of *Pittsburg, Cincinnati and St. Louis Railroad Co. v. The State*, 30 N. E. 435, the question arose whether a law exacting a fee of \$1.00 per mile from railroads operating in the state of Ohio, exacted a fee under the police power or laid a tax on property. Under the provisions of the constitution of Ohio the legislature had the usual power to exact fees in the exercise of the police power for the purpose of paying the cost of regulation. But the court held that the exaction was a tax on the railroads of the state, notwithstanding the fact that it was called a fee, and that it was void because it lacked uniformity and was not assessed according to value, as required by the Ohio constitution. In the course of the opinion, the Supreme Court of Ohio, say:

“What is this statute? Its constitutionality must be determined by its operation. It provides in terms that there be placed upon each mile of railroad track within this state an exaction of \$1 per annum; the statute calls it a “fee”, but its nature is not affected by the name that may be assigned to it.”

So also in the case of *Pittsburg Railroad Co. v.*

Pittsburg, 60 Atl. 1080, it was held by the Supreme Court of Pennsylvania that a license tax upon street railways of twenty-five cents per foot for each lineal foot of track was not a license tax notwithstanding the fact that it was so called, but was in fact a tax upon the tracks of the street railway companies.

The same doctrine was laid down by the Supreme Court of Missouri in the case of Brookfield v. Toory, 43 S. W. 387. The city of Brookfield in that state had passed an ordinance requiring merchants to pay a license tax, the amount of the tax required in each case being one per cent upon the cash value of the stock of goods, wares and merchandise kept on hand for sale. The court held that this was not a license tax, but a tax upon the merchants' stock. In the course of the opinion it is said: "In a word can this tax of one per cent upon the cash value of the goods on hand be held as an occupation or privilege tax. After a careful investigation of the question mooted and most ably discussed by counsel, it seems palpable that this is a property tax pure and simple. It is an obvious mis-nomer to call it a tax upon occupation."

In the case of Banger's Appeal, 109 Pa. St. 79, elsewhere referred to in this brief, the city of Williamsport sought to collect an occupation tax, the amount of which was in each case determined by the income of the person taxed. This tax was held to be void on two grounds. One of these was that it was in fact an income tax, which the city had no pow-



er to collect. The other was that if viewed as a license tax it lacked uniformity. With reference to the first ground upon which the tax was held void, the Supreme Court of Pennsylvania say: "This brings us at once to a vice underlying the whole case. Under the guise of an occupation tax, the city of Williamsport has levied and is seeking to collect an income tax."

#### (C.-2) Viewed as a License Tax.

The power of the legislature to levy or collect taxes, does not exist as an inherent power but because of a grant contained in the Organic Act and must, as was said when the validity of income taxes was being discussed, be exercised in strict subordination to the provisions in the Organic Act expressly limiting that power.

The act requires that "ALL TAXES SHALL BE UNIFORM UPON THE SAME CLASS OF SUBJECTS AND SHALL BE LEVIED AND COLLECTED UNDER GENERAL LAWS AND THE ASSESSMENTS SHALL BE ACCORDING TO THE ACTUAL VALUE THEREOF." This provision requires all taxes to be uniform upon the same class of subjects, requires all taxes to be levied and collected under general laws and requires all taxes to be assessed according to the value of the thing which is the subject of taxation—under it there must be uniformity, there must be an assessment and the tax must be based upon value. Again, the provision applies to all taxes meaning each and



every tax; its effect is nowhere limited to property taxes, nor does it contain an exception in favor of licenses taxes.

The tax in question violates each of these requirements. In the first place it can not in any sense, as has already been pointed out, be regarded as uniform upon the same class of subjects. The lack of uniformity in this tax is amply illustrated by the case that arose in Pennsylvania, *Banger's Appeal*, 109, Pa. St. 79. The city of Williamsport sought to collect an occupation tax, the amount of which was in each case determined by the income of the person taxed. The tax was held void on two grounds. First it was held that the tax was in fact an income tax, which the city had no authority to levy or collect. And second, that if viewed as a license tax it would nevertheless be void because it was not uniform upon the same class of subjects as required by the Pennsylvania constitution.

In passing upon this question of lack of uniformity in the tax, the court say, having previously referred to some of the views expressed by the trial court, "These views of the learned court are well enough as far as they go, but they do not come to the proper standard of uniformity. However, they might have been regarded prior to the adoption of the present constitution. They do not conform to the requirements of the Organic Law as it exists at the present time. That requires not merely that there shall be no exemption of persons or classes,

but that upon persons and classes the tax shall be uniform. Thus in levying a tax upon "occupation" a tax of \$100 upon every person having a known occupation would be uniform, but what uniformity is there in laying an occupation tax of \$100 upon A and a like levy of \$200 upon B, the occupation of each being similar?"

And again in the course of the opinion it is said: "It may be asked how an occupation is to be assessed and how is the constitutional mandate to be complied with? The answer is not difficult. A tax of \$100 upon all occupations would be uniform. We are at once confronted with the objection that it would be unjust to tax the occupation of a laborer the same amount as a merchant, a physician or a lawyer. The injustice of such an exercise of the taxing power may be conceded without in any degree impairing the force of the argument. The objection is one that appeals more to the Legislative than to the judicial department of the government. The proper result may possibly be reached by classification. Thus it may be that physicians, lawyers, clergymen, merchants, bankers, manufacturers, mechanics, etc., etc., may be classified and a uniform occupation tax assessed upon each class, but it will not do to tax one member of a class \$100 and another member of the same class \$1000 upon a supposition or even upon the fact that one earns more than the other. An occupation tax is peculiar in its character. It is not a tax upon property, but up-

on the pursuit which a man follows in order to acquire property and support his family. It is a tax upon income in the sense only that every other tax is a tax upon income. That is to say, it reduces a man's clear income by the precise amount of the tax, but it is an income tax in no sense."

Nor does the law comply with the provision that there must be an assessment for no assessment of any kind is provided for. The principal objection, however, to the tax when viewed as a license tax is that it is not assessed according to the value of the thing taxed. Viewed as a license tax on the occupation of mining it utterly fails to comply with the requirement that the tax must be assessed according to the actual value of the thing taxed, for in that case the occupation is the thing which forms the subject of taxation. No attempt is made to place a value upon this. The amount of the tax is made to depend upon the income derived as a result of carrying on the business or occupation taxed, but the value of the income is not the value of the business or occupation. At most it represents the net profit realized during a given year, but this profit or income can in no sense be said to be the equivalent of the business or occupation from which it results. It might be resorted to as a criterion in determining the value of such occupation or business, but it is not and in no case can be an assessment of the value of the business or occupation that forms the subject of taxation. Hence if the tax is regarded as a license

tax it wholly fails to comply with the provision that it must be assessed according to value.

The learned trial judge, however, in the case of the Territory of Alaska, v. Alaska Pacific Fisheries expressed the opinion that a tax in many respects similar to this tax was a license tax, and that taxes of this character could be levied without complying with the requirements of the provision referred to, notwithstanding the fact that by its express term, "all taxes" without exception are made subject to the requirements mentioned. This view is based upon an erroneous conception of the effect of some of the decisions of the state courts.

These decisions were rendered in states having a variety of constitutional limitations and restrictions upon the taxing power, all unlike the provision contained in the organic law of Alaska. Of course the effect of a limitation contained in the organic law of any state or territory must depend in each case upon the language of the provision containing the limitation; and the decisions of the courts relating thereto must be read in the light of the language of the provision construed.

By many of the state constitutions license taxes are expressly provided for or excepted from the operation of the requirements of uniformity and assessment according to value. By others the provisions containing these requirements are expressly limited in their application to property taxes. By the Organic Law of Alaska all taxes, without ex-



ception, must comply with the requirements of uniformity and assessment according to value. An examination of the decisions upon which the opinion of the learned trial Judge is based will disclose the fact that they can all be distinguished for one or the other of the reasons given except only those cases which relate to licenses exacted for the purpose of regulation under the police power as distinguished from license taxes exacted for the purpose of revenue under the taxing power. These cases of course rest upon an entirely different principle.

When in the interest of the public health, the public morals or the public safety it becomes necessary to supervise or regulate an occupation or business, the legislature may require a license from those engaged therein for the purpose of regulating the same, and may in that connection adopt such regulatory provisions as may be necessary, it may also require the payment of a license fee sufficiently large to pay the costs of issuing the license and in addition thereto the costs of supervision and regulation. The fees required to be paid, however, cannot exceed the amount necessary for the purposes mentioned, and must be exacted in good faith to meet the expense of regulation and not for the purpose of raising revenue. In so acting the legislature proceeds under the police power of the state. In the exercise of the police power the legislature is of course not restricted by the limitations placed upon the taxing power and it is for that reason that the validity of laws exact-



ing license fees is not effected by provisions in the organic law relating to taxes. Such license fees are not taxes and depend for their validity not upon a compliance with constitutional requirements relating to taxes, but upon the question of whether the regulation in connection with which they are exacted is reasonably necessary to promote the public health, public morals or public safety.

Not so in the case of license taxes. These have nothing to do with the public health, public morals or public safety, in imposing license taxes the object and aim of the legislature is the collection of revenue. In character a license tax does not differ from any other tax. It is levied against the occupation or business of the person called upon to pay it just as a property tax is levied against the property of the person called upon to pay such tax, the object in each case being the production of revenue for the support of the government. The only difference between a license tax and a property tax lies in the procedure provided for enforcing the collection of the tax.

The collection of a property tax can be enforced by a seizure and sale of the property taxed. Collection of a license tax cannot be thus enforced because of the intangible character of the occupation or business which forms the subject of the tax. The only practical method by which the collection of this tax can be enforced consists in providing that it shall

be an offense to pursue the occupation or business taxed without first paying the tax.

The procedure followed is similar to that pursued in the collection of license fees under the police power. A license is required but this license performs no office except that it serves as a receipt for the taxes paid. When a license is granted under the police power it serves as a permit to do that which without the license would be unlawful because of its harmful effect upon the public health, public morals or public safety if permitted to be done without the restraint of the license and proper regulation thereunder—a right is conferred upon the recipient of the license which he did not have before it was issued. When, however, a license is issued to one in connection with the payment of a license tax no new right is conferred upon the recipient. The occupation or business licensed is not one which requires regulation and restraint in order to prevent injury to the public health, morals or safety, but is a useful one by which the Public health, morals and safety, as well as the public welfare ~~is~~ promoted. The recipient of the license had a right under the constitution to follow an occupation or business of this character without a license just as one has the right to the ownership and enjoyment of private property without a license. In exacting the license tax the government merely exercises its right to levy a tax against the occupation or business of the citizens for the purpose of

defraying the expense of government, just as it levies a tax against the property of the citizens for such purpose. Nothing more, nothing less. There is no difference between a license tax and a property tax. The apparent difference arises from the fact that in one case the thing is tangible, in the other intangible, which necessitates different methods of procedure when it comes to enforcing collection. Both are taxes in every sense of the word and being taxes must conform to the requirement of the organic law as to uniformity and assessment according to value unless, indeed, the provisions containing these requirements differ from those contained in the organic act of Alaska in that they are so worded as to be limited to one or to exclude the other.

There is no similarity between license fees exacted under the police power and license taxes exacted under the taxing power, although the method of procedure for their enforcement may be the same. As was said by Judge Cooley in his work on taxation page 396, "The distinction between a demand of money, under the police power, and one made under the power to tax is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation and the other for revenue. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in

classifying the case, and referring it to the proper power."

It will be seen therefore that the decisions that relate to license fees exacted under the police power have no application to the facts in this case. (Throughout this discussion the nomenclature found in most of the cases upon the subject, is followed; that is to say money axactions under the police power are referred to as "license fees," while those under the taxing power are referred to as "license taxes." In some of the caess the terms, license fees, license taxes and occupation taxes are all used, sometimes interchangeably, where money exactions under the police power are referred to.)

The various provisions contained in the organic laws of the various states and territories will next be discussed with a view of determining the applicability and effect of the decisions under each.

The constitution of the State of Alabama contains the following provisions: "All taxes levied on property in this state shall be assessed in exact proportion to the value of such property . . . . . The legislature shall not enact any law which will permit any person, firm, corporation or association to pay a privilege, license or other tax to the State of Alabama, and relieve him or it from the payment of all other privilege and license taxes in the state."



The constitution of the State of Arkansas provides as follows: "All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct making the same equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, provided the General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper."

The constitution of the State of Florida provides as follows: "The legislature shall provide for a uniform and equal rate of taxation and shall prescribe such regulations as shall secure a just valuation of all property . . . . . The legislature may also provide for levying a special capitation tax and a tax on licenses."

The constitution of the State of Illinois contains the following provisions: "The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, such value to be ascertained by some person or persons, to be selected or appointed in such manner as the General Assembly shall have power to tax peddlers, auctioneers,



brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests, or business, vendors of patents and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates.”

The constitution of the State of Idaho contains the following provisions: “The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, or her, or its property, except as in this article hereinafter otherwise provided. The legislature may also impose a license tax (both upon natural persons and upon corporations, other than municipal, doing business in this state); also a per capita tax . . . . . All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation of all property, real and personal.”

The Montana Constitution provides as follows: “The necessary revenue for the support and maintenance of the state shall be provided by the Legislative Assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such

regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article. The Legislative Assembly may also impose a license tax, both upon persons and upon corporations doing business in the state."

The constitution of Nebraska contains the following provision: "The Legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the tax to be ascertained in such manner as the Legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct, uniform as to the class on which it operates."

The constitution of the state of Louisiana contains the following provision: "Taxes shall be equal and uniform throughout the limits of the authority levying the tax, and all property shall be taxed in proportion to its value." Provision is also made for a license tax, to be graduated upon persons pursuing the several trades, professions, vocations, and callings. All occupations may be liable to such tax except those of clerks, laborers, clergymen, school teachers, those engaged in mechanical, horticultural,

agricultural, and mining pursuits, and manufacturers, other than those of distilled, alcoholic, or malt liquors, tobacco, cigars, and cottonseed oil.

The constitution of the state of North Carolina provides as follows: "The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe regulations to secure a just valuation for taxation of all property . . . . . And provided, further, That the General Assembly may provide for a graduated tax on incomes, and for a graduated license on occupations and business."

The constitution of the state of Texas contains the following provision: "Taxation shall be equal and uniform. All property in this state, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The legislature may impose a poll-tax. It may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this state. It may also tax incomes of both natural persons and corporations, other than municipal, except that persons engaged in mining and agricultural pursuits, shall never be required to pay an occupation tax."

The constitution of the state of Tennessee provides: "All property shall be taxed according to its

value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value, but the Legislature shall have power to tax merchants, peddlers and privileges, in such manner as they from time to time direct."

The constitution of the state of Utah provides as follows: "The Legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money . . . . . Nothing in this constitution shall be construed to prevent the legislature from providing a stamp tax, or a tax based on income, occupation, licenses, franchises, or mortgages."

The constitution of the state of Virginia provides as follows: "All property, except as hereinafter provided, shall be taxed, all taxes, whether state, local, or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws . . . . . The General Assembly may levy a tax upon incomes in excess of \$600 per annum; may levy a license tax upon any business which cannot be reached by the ad-valorem system."

The constitution of the state of West Virginia contains the following provision: "Taxation shall



be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law . . . . . The Legislature shall have power to tax, by uniform and equal laws, all privileges and franchises of persons and corporations."

The constitution of the State of Kentucky contains the following provisions: "Taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws. All property shall be assessed at its fair cash value. All property, whether owned by natural persons or corporations shall be taxed in proportion to its value . . . . . The General Assembly may by general laws only provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions."

The organic act of the Territory of Oklahoma provides as follows: "Nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to the taxation shall be taxed in proportion to its value: Provided, That nothing herein shall be held to prohibit the levying and collecting license or special taxes in the



territory from persons engaged in any business therein, if the legislative power shall consider such taxes necessary.”

It will be observed that the constitution of each of the states above referred contain express provisions authorizing the collection of license taxes. The language employed varies, but in each case it is clear that the framers of the constitutions intended to authorize the legislature to impose and collect license taxes for the purpose of revenue as distinguished from license fees exacted in connection with the requirement of a license for the purpose of regulation. It is needless to say that the courts in the states above mentioned have uniformly held that the legislature had the power to raise revenue by means of a license tax. Even in the states mentioned, however, it has been quite generally held that license taxes must be uniform upon the same class of subjects.

While the decisions of the courts under constitutions containing express provisions authorizing the enactment of laws requiring license taxes can have no application to a case arising under the organic act of Alaska, where no such provision exists, it is a noteworthy fact that the framers of these constitutions deemed it necessary to insert these express provisions in order to reserve the right to collect revenue by means of license taxes. Obviously they took the position that the insertion of the provisions with reference to uniformity and assessment accord-

ing to value would destroy the right to collect license taxes unless that right was expressly reserved. No other reason can be assigned for the action taken.

A consideration of the Oklahoma organic act discloses the fact that Congress also took the view that unless the right to collect revenue by means of license taxes was expressly reserved, that right would be destroyed by the insertion in the organic act of a provision requiring uniformity and assessment according to value. Had it been the intention of Congress to permit the Alaska Legislature to raise revenue by means of license taxes it would have taken the same action that it took in the case of Oklahoma and reserved that right by a similar provision. The failure of Congress to reserve to the Alaska Legislature this right is, however, easily accounted for.

An examination of the organic act will disclose the fact that the powers conferred upon the Alaska Legislature are everywhere limited and circumscribed and the limitation upon the power to levy taxes without reserving the right to raise revenue by means of license taxes is in harmony with the general purpose of Congress to limit the power of the legislature as expressed by the organic act, taken as a whole. The sparsely settled condition of the territory, its vast extent and other peculiar conditions not met with elsewhere are the reasons that suggest themselves for thus limiting the power of the Territorial Legislature. In denying the right to raise revenue by means of license taxes, Congress

*have*  
 must ~~had~~ had in mind not only the peculiar conditions existing in the territory, but also the unusual provisions of the organic act with reference to representation in the legislature made necessary because of these peculiar conditions. Under the provision of the organic act each judicial division, regardless of its population, or wealth, is allowed four representatives in the lower house and two in the upper house of the legislature; that this arbitrary apportionment of the ~~members~~ *members* of representatives to which the various parts of the territory should be entitled in the legislature might lead to serious abuses in connection with the imposition of license taxes, must have been apparent to Congress.

The industries carried on in the territory are such that each is carried on in its own peculiar locality and not elsewhere, at least not to any extent, so that a license tax on any industry falls on the particular locality only in which that industry is carried on. The temptation of working for and voting for a license tax on an industry not carried on in his division is constantly held out to each member of the legislature.

The mines and the fisheries form the basis of all industrial activity in the territory. The fisheries are located along the coast in the first and third divisions and the quartz mines also are located near the seashore in these same divisions, while the placer mines are found in that portion of the third division extending back into the interior and in the second and fourth divisions. Thus a license tax imposed

upon the fisheries burdens the coast regions of the first and third division only, a license tax on the quartz mines/ operations falls exclusively upon the same localities, while a license tax upon placer mine operations effects only the second and fourth divisions and that part of the third division which extends into the interior.

Not only must Congress be presumed to have had these things in mind but also the fact that a license tax is a convenient tax to impose and that its burdens fall upon a limited number only who are not always represented in the legislature, and that imposing such taxes the legislature would only be following naturally along the lines of least resistance and greatest traction.

The members of the legislature that passed the law under consideration undoubtedly acted in the best of faith. They were undoubtedly honest men who acted honestly. Yet the injustice and inequality resulting from this character of taxation, regardless of the honesty and good faith with which it is invoked, and against which Congress undoubtedly intended to protect the people of Alaska, becomes apparent when the present law is examined.

The legislature never made any provision for the levying of any property tax whatsoever. All the money required to pay the expense of the Territorial Government is sought to be collected by means of license taxes. No substantial license tax is exacted from anyone engaged in any industry except the



mines and fisheries. Nor are all the mines taxed, the mines are not taxed unless they yield a net income in excess of five thousand dollars per annum. The low grade character of the quartz mines makes it necessary to employ larger units in connection with their operations. Enormously large capitals are required to successfully operate these mines, and of course, if the operations prove successful, the income is correspondingly large, so that the five thousand dollar exemption makes no practical difference one way or the other. The placer mines on the other hand are operated in small units so that while there are comparatively few quartz mines in operation the number of placers in operations is almost infinite, and while the aggregate yield of the placers may exceed that of the quartz mines, the yield of any one placer is comparatively small and does not except in isolated cases produce a net income of more than five thousand dollars. And even where the net income exceeds five thousand dollars it must always be a difficult matter to collect a tax thereon in view of the fact that, it is a matter of common knowledge, that accurate books of account are rarely kept in connection with the conduct of small individual enterprises. It follows that under this law the fisheries and the quartz mines situated along the coast in the third and first divisions are called upon to pay all but a very small per cent. of the taxes required to meet the expense of the Territorial Government. This in spite of the fact that the



fisheries are also required to pay a tax to the federal government under the act of June 1906 and the quartz mines are required to pay a tax to the federal government of three dollars per stamp under the act of Congress.

The constitutional provisions in any wise similar to the provision in the Organic Act of Alaska, found in the various state constitutions, and unaccompanied by other express provisions limiting their effect so as to have no application to license taxes or providing in express terms for the imposition of license taxes, will next be considered together with the decisions of the state courts thereunder:

The constitution of the State of California contains the following provisions:

“all property in the state not exempt under the laws of the United States shall be taxed in proportion to its value, to be ascertained as provided by law. The word ‘property’ as used in this article and section is hereby declared to include moneys, credits, bonds, stocks, franchises and all other matters and things, real, personal and mixed, capable of private ownership.”

“The Legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations or upon the inhabitants or property thereof for county, city, town, or other municipal purposes, but may by general laws vest in the corporate authori-

ties thereof the power to assess and collect taxes for such purposes."

The constitution also expressly provides that income taxes may be assessed and collected.

The provisions of the constitution of California first above quoted are not only expressly limited in their application to property taxes, but the meaning of the word "property" as therein used is expressly defined. Under the decisions of the state courts generally, which differ in that regard from the decision rendered by the Supreme Court of the United States in the case of *Welton vs. State*, 91 U. S. 278, hereinbefore referred to, license taxes are not regarded as taxes upon property. They are regarded as taxes upon occupations, and these occupations are in turn regarded as intangible things separate and distinct from the property used in pursuing such occupations. Viewing license taxes in this light, constitutional provisions which are expressly limited in their application to property taxes, such as is the provision in the California Constitution above quoted, can have no application to license taxes, since these are not regarded as taxes upon property. There is then in the California constitution no provision to which license taxes must conform. The decisions under that section of the constitution prohibiting the imposition of taxes on counties, cities, etc., however, shed light upon the meaning of the words "all taxes" as employed in the Organic Act of Alaska.

The legislature of the State of California had

passed a law requiring those engaged in certain kinds of businesses to take out a license and pay therefor fixed sums which were to be turned into the county treasury. This law was before the Supreme Court of California in the case of *People vs. Martin*, 60 Cal. 153. Its validity was assailed on the ground that the legislature had no power under the constitution to collect taxes for county purposes. It was contended that the license tax imposed was not a tax within the meaning of the constitution. It will be observed that the constitutional provision is not limited in its application to property taxes in that the taxes prohibited are those "upon the inhabitants or property thereof." This clause in the constitution, the Supreme Court of California held included not only property taxes, but also license taxes which were taxes upon the inhabitants. This act was held void. In passing upon this matter, Judge Ross, who was then a member of the Supreme Court of California, speaking for that Court, says:

"The important question in the case is, whether or not the word 'taxes' as used in this section of the constitution includes license taxes; for, if it does, the provisions of the Political Code imposing and providing for the collection of the license tax here in question, are clearly inconsistent with this section of the constitution, and therefore inoperative by virtue of Section I of Article XXII of the same instrument.

"That the license fees imposed by the pro-

visions of the Political Code were so imposed mainly, if not solely, for the purpose of revenue, does not admit of doubt; and where that is the case, they are, in effect, taxes. (Cooley on taxation, pages 396-7; 2 Dillon on Mun. Corp. Sec. 768.) Indeed, the statute itself designates the charge as a license tax. (Political Code, Sec. 3,359.)

“But are they ‘taxes’ within the meaning of Section 12 of Article XI, of the Constitution? We are of the opinion that they are. It is clear that that section is not limited to taxes upon property; for by its express language the legislature is prohibited from imposing taxes upon the inhabitants of counties, cities, towns, or other public or municipal corporations, as well as upon their property, for county, city, town, or other municipal purposes. The defendant is an inhabitant of the county of Santa Cruz, engaged in the business of selling goods, wares, and merchandise. The tax imposed upon him, and which it is proposed to collect, was undoubtedly imposed for county purposes; for as already observed, the statute authorizing it, required the tax when collected to be paid into the County Treasury for the use of the County General Fund. The power to impose such taxes for such purposes, in our opinion, no longer remains with the Legislature;”

This decision is especially applicable to the pres-



ent case in that it clearly shows the reason why some of the provisions in the various state constitutions are not applicable to license taxes. These provisions are limited to taxes on property by their express terms just as is the first provision above quoted from the California Constitution. But the provision before the Court in this case was not so limited but applied to taxes on the inhabitants and taxes on the property alike, which made it in all respects similar to the provision in the Alaska Organic Act, which is applicable by its terms to "all taxes" without regard to their character.

One of the judges then a member of the Supreme Court of California dissented from the majority ~~of~~ opinion, taking the same view that the learned trial court took in this case, that license taxes were to be distinguished from other taxes in some manner and were not to be regarded as included within constitutional provisions relating to taxes, a view that resulted from confusing license taxes exacted under the taxing power with license fees exacted under the police power.

The Supreme Court of California in rendering subsequent decisions, however adopted the views expressed by Judge Ross and concurred in by the majority of the court as law. See *Ex Parte Schuler* 139 Pac. 985. And the Supreme Court of Missouri in construing a constitutional provision containing the same language, as will be pointed out when the provisions of the constitution of that state are discussed, adopted the same construction.



The constitution of the State of Colorado provides as follows:

“All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for the taxation of all property real and personal.”

Under this constitutional provision it has been held in Colorado that a license tax can be laid and collected. It will be observed that the constitutional provision contains the following “which shall prescribe such regulations as shall secure a just valuation for the taxation of all property real and personal.” This provision of course by its terms is applicable only to property taxes.

The constitution of the State of Delaware provides as follows:

“All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws,”

The effect of this constitutional provision does not seem to have been passed upon by the Supreme Court of Delaware in so far as it affects license taxes.

The constitution of the State of Georgia provides as follows:

“All taxes shall be uniform upon the same

class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax and shall be levied and collected under general laws."

It will be observed that under this constitutional provision all taxes, without regard to their character, are required to be uniform upon the same class of subjects. It is accordingly held by the Supreme Court of Georgia that license taxes must conform to this provision. It will be further observed that the requirement that taxes shall be ad valorem is expressly limited to property taxes. Under this constitutional provision therefor licenses taxes are excepted from the provision that taxes must be according to value. This constitutional provision therefore permits the levying of licenses taxes, though such taxes are not levied according to value, or ad valorem provided they are uniform upon the same class of subjects, and this has been the construction placed upon the provision by the Supreme Court of Georgia.

The Supreme Court of Georgia, however, went somewhat further and held that where a license tax on merchants was graduated in proportion to the volume of business transacted, the tax should be according to value, notwithstanding the fact that the constitutional provision requiring taxes to be ad valorem was limited expressly to property taxes. The Court say: "It is true that the clause cited in words applies to property, but in sense and spirit we think it covers a business tax scaled by the amount or value

of the business transacted.” *Johnson vs. Macon*, 62 Ga. 645. In this case it was further held that a license tax law graded in proportion to the amount or value of business transacted as above indicated was not sufficiently uniform upon the same class of subjects.

The constitution of the State of Indiana provides as follows:

“That the general assembly shall provide by law for a uniform and equal rate of assessment and taxation and shall provide such regulations as shall secure a just valuation for taxation of all property both real and personal.”

The provisions of this constitution it would seem are clearly limited so as to apply to property taxes only. Nevertheless the Supreme Court of Indiana in the case of *Henderson vs. London & Lancashire Ins. Company*, 135 Ind. 24, held that a tax on the business of such foreign insurance companies as are doing business in counties having cities with paid fire departments, which tax is to create a fireman's fund, violates the constitutional provision requiring equality and uniformity of taxation as it applies only to a portion of the class of foreign insurance companies, and the power of the whole state is thus exercised on a portion of the class for the benefit of a small part of the citizens of a few cities of the state. This decision indicates the tendency of the courts to apply the constitutional provisions of this character to license taxes wherever possible.

The constitution of the state of Kansas provides as follows:

“The legislature shall provide for a uniform and equal rate of assessment and taxation; but all property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal property to the amount of at least two hundred dollars for each family shall be exempted from taxation.”

This constitutional provision by its terms deals with taxation of property only and accordingly the Supreme Court of Kansas held that it did not apply to license taxes.

The constitution of the State of Maine contains the following provision:

“All taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just valuation thereof.”

This provision like that contained in the Indiana Constitution is by its terms limited in its application to taxes on real and personal estate and does not therefor apply to licenses taxes.

The constitution of the State of Minnesota provides as follows:

“All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform



throughout the state . . . . . Laws shall be passed taxing all moneys, credits, investments, in bonds, stocks, joint-stock companies or otherwise, and also all real and personal property, according to its true value in money."

It will be noted that the provision in this constitution requiring equality applies to all taxes alike, but that the remaining provisions requiring levies to be made according to cash valuation, and taxes to be assessed according to value are expressly limited in their application by the terms of the provision to property taxes. It was accordingly held by the Supreme Court of Minnesota that all license taxes must be uniform, and further that all taxes upon property must be assessed according to value. *Willis v. Standard Oil Co.*, 52 N. W. 652-4; *In Re Tax Delinquency in St. Louis County*, 75 N. W. 970; *Minces v. Schoenig*, 75 N. W. 711;

In the case of *Willis v. Standard Oil Company*, the Supreme Court of Minnesota was called upon to pass on the validity of a law providing for the payment of a fee to inspectors of oils. All oils shipped in and used for illuminating purposes were required to be inspected and the inspector was, for such inspection, entitled to certain fees. The objection was made that the fees exacted were exacted for the purpose of revenue and that the measure was in fact a measure designed to raise revenue. The Court held if that were the object of the measure, it could not be sustained under the constitutional provision. The



court says: "It is also objected that the act is one levying a tax, and not a police regulation. Of course, under the constitutional provision requiring taxes to be as nearly equal as may be, and to be levied on a cash valuation, the law could not be sustained as a tax law. It can only be upheld as an exercise of the police power of the state;"

In the case of *Re Tax Delinquency in St. Louis County*, the Supreme Court of Minnesota passed upon a law providing that mining companies might pay in the state treasury annually, in lieu of all taxes or assessments upon capital stock, personal and real estate, of such companies in or upon which real estate such business of mining might be carried on, or which was connected therewith, and set apart for such business the following amounts, to-wit: For each ton of copper, fifty cents, and for each ton of iron ore mined, shipped or disposed of, one cent. The court held that under the Minnesota Constitution the act was void, and in passing upon the matter they say: "It would be difficult to conceive of a system of taxation more obnoxious to the Constitution."

In the case of *Minces v. Schoenig*, the court had before it an ordinance passed by the City of Winona which contained the provision that those who conducted bankrupt sales were to obtain a license and in addition to the payment of ~~such~~ fee, justified under the police power, were required to pay a tax of two per cent. of the amount of the gross receipts.

In holding this ordinance void, the court says: "This mode of taxing is so palpably in conflict with Section 1, Article 9 of the Constitution which requires that all property on which taxes are to be levied shall have a cash valuation, that it cannot stand for a moment. The legislature itself has not power to adopt any such system of taxation, or to grant authority to a municipality to do so."

The constitution of the State of Michigan contains the following provisions:

"The legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law . . . . . All assessments hereafter authorized shall be on property at its cash value.

"The legislature shall provide for an equalization of a state board in the year 1851, and every fifth year thereafter, of assessments on all taxable property except that paying specific taxes."

The Supreme Court of Michigan held that the terms "specific tax" used in the constitution provision embraced license taxes, a license tax being of course a specific tax on business.

Under the constitution of the State of Massachusetts the legislature is empowered

"to impose and levy proportional and reas-

onable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities, whatsoever, brought into, produced, manufactured, or being within the same."

The effect of this constitutional provision was before the Supreme Court of Massachusetts in the case of *Portland Bank v. Apthorp*, 12 Mass. 252-256. The legislature had enacted a law taxing banks one-half of one per cent. on the amount of their capital stock. In discussing the validity of this law in the light of the constitutional provision, the Supreme Court of Massachusetts hold that the tax could not be justified under the first part of the provision and in that connection the court say: "Under the first branch of this power, namely, that of imposing and levying rates and taxes, the requisition upon the banks cannot be justified; for those taxes must be proportional upon all the inhabitants of, and persons resident and estates lying within, the Commonwealth. The exercise of this power requires an estimate or valuation of all the property in the Commonwealth; and then an assessment upon each individual, according to his proportion of that property. To select any individual or company, or any specific article of property, and assess them by themselves, would be a violation of this provision of the constitution."

It will be observed from the language quoted that the assessment of a license tax would be considered as prohibited under the constitutional provision if the first portion of the provision alone were considered, yet this portion of the constitution of Massachusetts does not ~~at~~ clearly and definitely apply to all taxes alike as does the provision in the Alaska organic law.

The tax in question was, however, upheld by the Supreme Court of Massachusetts on the ground that the subsequent portion of the provision in the Massachusetts constitution allowed the collection of excises on commodities. The term "commodity" was given a broad meaning, so broad indeed as to include everything on which a tax could be laid. The court justified its action in so construing the word "commodity" on the ground that the legislature had always so construed it since the adoption of the constitution itself thirty years ago. This was considered by the court as being sufficient evidence to show that the framers of the constitution must have intended to give this meaning to the word "commodity."

The constitution of the State of Mississippi provides as follows:

"Taxation shall be uniform and equal throughout the state. Property shall be taxed in proportion to its value . . . . . Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value."



It will be noted that the provision requiring uniformity and equality applies to taxes generally, while the remaining provisions are limited by their terms to property taxes.

The constitution of the State of New Hampshire gives the General Court power

“to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and residents within, the said state, and upon all estates within the same.”

Under this provision of course a license tax can be imposed as, “it is a tax,” as the Supreme Court of California held in the case of *People v. Martin*, “upon the inhabitants.” Nevertheless the Supreme Court of New Hampshire held that these taxes must be uniform. *State v. Pennoyer*, 65 N. H. 113; 18 Atl. 878. In this case the Supreme Court of New Hampshire had before it a law requiring physicians to procure a license and pay a stipulated amount therefor. The law did not apply alike to all physicians and was accordingly held void as lacking in uniformity.

The constitution of the State of Missouri contains the following provisions:

“Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and all taxes shall be levied and collected by general laws.



"All property subject to taxation shall be taxed in proportion to its value.

"The General Assembly shall not impose taxes upon counties, cities, towns, or other municipal corporations or upon the inhabitants thereof or property thereof, for county, city, town or other municipal purposes, but may by general laws vest in the corporate authorities the power to collect and assess taxes for such purposes."

It will be noted that this constitution, like practically all the other constitutions, and unlike the Alaska organic act, contains two separate provisions, one applying to taxes generally and the other to property taxes only. It is similar to the Alaska organic act in that all taxes are required to be uniform upon the same class of subjects. It differs from the Alaska organic act in that under it all property subject to taxation shall be taxed in proportion to its value, while under the Alaska provision "all" taxes must be assessed according to the value of the thing which is the subject of taxation. This constitutional provision is construed by the courts so as to carry out the meaning so clearly expressed and license taxes are included within the provision, where taxes generally are referred to and are required to be uniform upon the same class of subjects.

In the case of *City of St. Louis v. Spiegel*, 2 S. W. 839, it was held that license taxes must under the Missouri constitution be uniform upon the

same class of subjects. An ordinance had been passed by the City of St. Louis providing for a license tax of \$25 on meat shops situate in one part of the city and \$50 on meat shops situate in another part of the city. It was held that this license tax violated the constitutional provision requiring uniformity.

The constitutional provision providing that the legislature shall not tax counties, cities, etc., or the inhabitants or property thereof, for county, city, town or other municipal purposes, is in all respects like the provision that subject contained in the California constitution, and the Supreme Court of Missouri placed thereon the same construction previously placed on a similar provision by the Supreme Court of California. *State Ex Rel Wyatt vs. Ashbrook* 72 Am. St. Rep. 765.

It was claimed in this case that an act of the Missouri legislature requiring a license tax from department stores was void for two reasons. First that the legislature had no power to pass the law since two-thirds of the revenue derived under it was paid into the city treasury, the law being therefor designed to raise revenue for municipal purposes and being imposed upon the inhabitants of the cities. And for the further reason that it lacked uniformity in that it applied only to department stores. The Supreme Court of Missouri held that the act violated the constitution in both respects. This decision, like the decision by the Supreme Court of California, is

important in that it is held that the term "tax" when used in the constitution includes license taxes unless it is expressly restricted to property taxes. As in California the tax therein prohibited was any tax on the inhabitants or property. In Alaska the term used is "all taxes" which is equally comprehensive.

The constitution of the State of Nevada provides as follows:

"The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal, and possessory."

This provision by its terms requires no more than a just valuation for taxation of all property, real personal and possessory, and has of course no application to license taxes.

The constitution of the State of New Jersey provides as follows:

"Property shall be assessed for taxation under general laws and by uniform rules according to its true value."

This provision also is limited in its application to the taxation of property.

The constitution of North Dakota provides as follows:

"laws shall be passed taxing by uniform rule all property according to its true value in money."

The terms of this provision also expressly apply to the taxation of property only.

The constitution of the State of Ohio provides as follows:

“Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also all real and personal property, according to its true value in money;”

It will be observed that the provisions in the Ohio constitution are such that they apparently relate to property taxes only yet the Ohio courts have persistently justified non-uniformity in connection with money exactions for licenses on the ground that they were exacted under the police power, indicating thereby that exactions under the taxing power would be required to be uniform.

The Ohio decisions are reviewed in the opinion in the case of *Pittsburg, C. & St. L. R. R. Co. v. State*, 30 N. E. 435. An act passed by the Ohio Legislature required every corporation or company operating a railroad or any part of a railroad within the state to pay to the Commissioner of Railroads and Telegraphs a fee of \$1.00 per mile for each mile of track operated by it within the state. The constitutionality of this act was assailed on the ground that it levied a specific tax on property. It was contended that the money sought to be collected was a fee and not a tax and did not come within the constitutional inhibition. In support of this contention, it was urged that the Supreme Court of Ohio in a pre-



vious decision had held that a license fee exacted from gas companies did not come within the constitutional inhibition requiring uniformity. The Supreme Court of Ohio reviewed this early decision indicating that the gas business was a business that required police supervision; that the law imposing the exaction upon the gas companies provided for numerous kinds of regulation and that the license fee required from the gas companies was required in order to pay the cost of this regulation under the police power. It was further shown that the decision of the court in that case was based upon that ground and the law sustained as an exercise of the police power. The court then proceeded to apply this theory of the law to the facts in the case. It was pointed out that the law under consideration did not provide for any regulation and that the exaction of \$1.00 per mile was a tax pure and simple and that its nature as a tax was not affected by the fact that it was called a fee. The court say: "A tax is a pecuniary burden imposed for the support of the government . . . . . Burdens or charges imposed by the legislative power of a state upon persons or property to raise money for public purposes. The money raised by this section under consideration is directed to be paid into the state treasury; it becomes a part of the funds of the state applicable to any conceivable public purpose. There is not a word in the section under consideration, or in the act to which it is supplementary, to indicate a purpose that the



fund raised shall be limited, or even in any way specially applied, to the expenses incurred in supervising the railroads of the state. A law like this—the direct and only purpose it can accomplish, being to create a fund by an exaction on property to be paid into the state treasury to be used indiscriminately for any and all public purposes—must be regarded as creating a tax. It bears no resemblance to, and should not be confounded with, that class of laws enacted by the legislature, the immediate object of which is to call into active operation the police powers of the state, but which, incidentally or indirectly, may cause the production of public revenue.”

The constitution of the State of Oregon provides as follows:

“No tax duty shall be imposed without the consent of the people or their representatives in the Legislative Assembly; and all taxes shall be equal and uniform.

“The Legislative Assembly shall provide by law for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal  
 . . . . .”

It will be observed that the only provision in the Oregon constitution that applies to all taxes is the provision requiring equality and uniformity. The other provisions are expressly limited in their application to taxation of property, real and personal. All

that would be required of a license tax under this provision is equality and uniformity. Taxes on property, however, both real and personal are required to be in accordance with a just valuation.

In deciding the case of *Ellis v. Frazier*, 63 Pac. 642, the Supreme Court of Oregon was called upon to pass on the validity of a tax under the Oregon constitution. A law had been passed by the Oregon legislature requiring the owners of bicycles to pay a tax of \$1.25, whereupon they were furnished with a tag indicating that the tax had been paid, which was to be attached to the bicycle for and on account of which it had been collected. It was contended that this was an exaction that did not come within the constitutional inhibition. But the court held it was a tax and that for that reason it was void as lacking uniformity since bicycle owners in certain counties only were required to pay it. And furthermore that it was a property tax and for that reason violated the constitutional inhibition that property taxes must be *ad valorem* or assessed according to value. In passing upon this question the Supreme Court of Oregon say: "As a preliminary matter, it is important to consider whether the burden thus imposed upon bicycle owners is a tax or a license; for, if the latter, it is no inhibited by the provisions of the organic act relied upon, the courts generally holding that the constitutional requirement as to uniformity of taxation has no reference to the taxation of occupations." (It must be noted that the

Supreme Court of Oregon used the term "license" and the term "occupation tax" interchangeably as referring to exactions under the police power and not to exactions under the taxing power; that what is usually spoken of as a license tax is not included within the meaning of either of the terms as used by the Oregon Supreme Court. This is evident from the context.) Continuing the court say: "The legislative assembly has referred to the levy as a tax, but the descriptive designation is unimportant; for the object sought to be attained by the enactment must determine the character of the exaction. 'The distinction between a demand of money, under the police power, and one made under the power to tax,' says Judge Cooley, 'is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation, and the other for revenue. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case, and referring it to the proper power.' Cooley, Tax'n. 396. It was held, in the case of *In re Wan Yin* (D. C.) 22 Fed. 701, that whenever it is manifest that the fee for a license to conduct an occupation is substantially in excess of the sum necessary to cover the cost of issuing the license and the incidental expense attending the regulation of the business, the burden is a tax, and not a license." The court then proceeded to review other similar cases and continuing say. "Whatever the

rule may be in respect to the granting of licenses which incidentally result in producing a revenue, or the law in relation to the authority of a municipal corporation in the maintenance of its streets, it cannot reasonably be inferred that the burden imposed by the act in question was an exercise of the police power of the state; for the use of a bicycle does not necessarily tend to the destruction of the highways. We do not wish to be understood as intimating that the sum of one dollar more than the cost of executing the necessary receipts and supplying the requisite tags is an unreasonable exaction, but, inasmuch as that sum is set apart from each collection as a fund for the purpose of constructing and maintaining bicycle paths, it is evident, we think, from a consideration of the entire act, that it was primarily designed as a means of raising revenue, and the burden thus imposed must therefore be treated as a tax, and not a license." It was then held that since bicycles differ greatly in value, the tax violated the provision requiring uniformity and equality. The court say: "The value of all bicycles not being the same, the tax of \$1.25 upon each destroys the required uniformity in the assessment, and renders the rate of taxation unequal, so that the tax in this respect violates the constitutional provision above quoted." As has been elsewhere shown in this brief the act was also held to violate the constitutional provision that property must be taxed according to value, the court holding that this tax was in fact a tax on the property itself.



Later on the Supreme Court of Oregon had occasion to pass upon the act of the legislature more or less similar in character, *Reser v. Umatilla County*, 86 Pac. 595. In this case the court had before it an act which required the nonresident owners of sheep bringing sheep into the state for pasturage or for the purpose of driving such sheep through the state, to pay a tax of a fixed sum per head. It was urged by the Attorney General that the exaction was made under the police power of the state and was not therefor subject to the limitations imposed by the constitution with reference to the collection of taxes. But the court held the exaction to be a tax and held the tax void as lacking in uniformity and as having been levied without regard to valuation. In the course of the opinion it <sup>also</sup> say: "It is sometimes difficult to distinguish between a tax and a license. Generally speaking, a tax is a charge or burden imposed on persons or property for the support of the government or for some specific purpose authorized by it. Its object is to raise revenue. A license, however, is a permission to do what would otherwise be unlawful. The fee or charge often exacted therefor is in law supposed to cover the cost of issuing the license and the expense incident to regulating and controlling the business, although it may ultimately result in a source of revenue. To relieve a law, imposing a burden or tax upon persons or property, from the operation of the constitutional provision relative to taxation, it must have for its primary ob-



ject the granting of some privilege or the imposing of some restraint.”

It will be noted that in each of these cases the law before the court levied a specific tax on property. Such taxes in common with all other taxes were required by the constitution to be equal and uniform, since the clause requiring equality and uniformity applied to all taxes alike and being property taxes they were required to be assessed according to value, since by the provisions of the constitution property taxes are required to be so assessed. However, since the constitutional provision requiring assessment according to value is expressly limited in its application to property taxes, there would seem to be no good reason why a license tax could not be collected in Oregon if such tax were equal and uniform unless the view were adopted expressed by the Supreme Court of the United States in the case of *Welton v. State* that these taxes on business were in effect a tax on the property employed in connection with such business. The Supreme Court of Oregon seems to have taken this view of the matter, for while the taxes before the court were not license taxes, but specific property taxes, the opinion in each case contains a discussion of the validity of specific taxes generally including license taxes and leads to the conclusion that under the Oregon constitution no money can be exacted except in the form of ad valorem property taxes unless the exaction be made in the exercise of the police power of the state.

The constitution of the State of Pennsylvania provides:

“All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax and shall be levied and collected under general laws.”

This constitution contains no provision requiring assessment according to value, the only provision contained being one requiring uniformity upon the same class of subjects and this, like the provision in the Alaska Organic Act, applies to all taxes alike. Accordingly it is held by the Supreme Court of Pennsylvania that occupation or license taxes come within its requirements and must be uniform. Banger's Appeal 109 Pa., St. 79.

In this case the court had before it an ordinance of the city of Williamsport under which it was sought to collect an occupation tax, the amount of which was in each case determined by the income of the person taxed. The ordinance was held to be invalid on two grounds: First, that the tax was in fact the income tax and that while the city of Williamsport had authority to levy occupation taxes, it had no authority to levy income taxes. Second, that the constitution of the state required all taxes to be uniform upon the same class of subjects; that the tax in question, regardless of its character, was not uniform upon the same class of subjects and was therefore void as failing to comply with this constitutional requirement. The court, discussed at

some length the manner in which occupation taxes could be levied so as to comply with the constitutional requirement of uniformity and the reason why the tax before the court did not answer this requirement. In referring to the opinion expressed by the lower court to the effect that the tax complied with the requirement of uniformity, the Supreme Court say: "These views of the learned court are well enough as far as they go, but they do not come to the proper standard of uniformity. However, they might have been regarded prior to the adoption of the present constitution. They do not conform to the requirements of the organic law as it exists at the present time. That requires not merely that there shall be no exemption of persons or classes, but that upon persons and classes the tax shall be uniform."

The constitution of the State of South Dakota provides as follows:

"All taxation shall be equal and uniform. All taxes to be raised in this state shall be uniform on all real and personal property, according to its value in money."

It will be observed that the constitution contains a uniformity clause that applies to all taxes alike, while the clause requiring taxation according to value is limited by its terms to taxes on real and personal property. It was accordingly held by the Supreme Court of South Dakota that since the clause requiring equality and uniformity applied to all taxation, license taxes must be equal and uniform. In

Re Watson 97 N. W. 465. In this case the court had before it a law requiring a license tax from peddlers, exempting peddlers of nursery stock and other classes of peddlers from its operation. It was contended that this tax lacked uniformity and was therefor obnoxious to the constitutional provisions requiring uniformity in the case of all taxation. On the other hand it was argued that in some jurisdictions the uniformity clauses were not applied to license taxes. The Supreme Court of South Dakota however held that such contention could not be maintained under the provision of the constitution of that state, which did not expressly limit the requirement of uniformity to property taxes, but provided that all taxes must be uniform. In reference to this matter the court say:

“Such position cannot be taken in this state. The clause ‘and all taxation shall be equal and uniform’, found in the Bill of Rights, cannot be ignored. Constitutions are supposed to be prepared with much care and deliberation. It will not do to assume that such important instruments contain any idle or meaningless phrases. On the contrary, it must be presumed that every word was advisedly selected, inserted for a purpose, and intended to have its due weight in determining what organic principles have been established. In this state, then, taxes on occupations must be equal and uniform.”

The constitution of the State of Washington provides as follows:



“all property in this state, not exempted under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property.”

It will be observed that each and every provision contained in this constitution relative to taxation is expressly limited by its language to property taxes and can therefore have no possible application to license taxes under the view taken by the state courts that those taxes are not taxes on property.

The constitution of the state of Wyoming provides as follows:

“No tax shall be imposed without the consent of the people or their authorized representative. All taxation shall be equal and uniform. . . . . All property, except as in this constitution otherwise provided, shall be uniformly assessed for taxation and the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal.”

It will be observed that the constitutional re-



quirement of equality and uniformity in Wyoming, as in South Dakota, applies to all taxation, while the provision requiring taxes to be assessed according to value is expressly limited to property taxes. There is therefore nothing in the constitution to prevent the exaction of license taxes provided they are equal and uniform.

In the case of *State vs. Willingham*, 9 Wyo. 290; 62 Pac. 797, a city ordinance was attacked on the ground that the license tax required was not uniform and was therefore in conflict with the constitution. The court reviewed the provisions of the ordinance and held that the tax imposed was in fact a uniform tax and satisfied the constitutional provision.

The constitution of the state of Wisconsin provides as follows:

“The rule of taxation shall be uniform and taxes shall be levied upon all property as the legislature shall prescribe.”

This constitutional provision is rather indefinite. Its effect was considered by the Supreme Court of Wisconsin in the following cases: *Fire Department of Milwaukee v. Holvanstein*, 16 Wis. 136; *Morrill v. State*, 38 Wis. 428; *State v. Whitcom*, 122 Wis. 110; 99 N. W. 468.

In the case of *Fire Department of Milwaukee v. Halvanstein*, the court passed upon the validity of a law requiring foreign insurance companies to pay a per cent. of their premiums for the benefit of the

fire departments of some of the cities. It was contended that this was a tax and void since it lacked uniformity. But the Court held that the exaction was not a tax but a fee exacted by the state in the exercise of its police power and that the law was no more than a police regulation. The court say: "Nor is the requirement an exercise of the power of taxation as to the companies, but only a proper exercise of the police power inherent in the sovereignty of the state."

~~Latter~~ The decision in the case of *Morill v. State* relating to the validity of an act of the state legislature requiring hawkers and peddlers to take out a license and pay a fee therefor. It was claimed that this was an exercise of the taxing power and that for that reason the fee must be uniform. The court however held that the legislature had the authority under the police power to prohibit hawking altogether, and had the undoubted power to regulate its exercise, because hawking and peddling were regarded as unsavory lines of business. It was accordingly held that the act in question was enacted under the police power for the purpose of regulation and was not governed by the constitutional inhibitions relating to taxation. After quoting from Jacob's Law Dictionary, where hawkers are defined as deceitful fellows etc., and making the statement that it was not the intention to cast any reflection upon the parties before the court, in view of the fact that many honest men were in the business of peddling,

the court say: "but with this disclaimer we must be permitted to add that undoubtedly resort is often had to this business for the sole purpose of obtaining admittance, which could not otherwise be obtained into private dwelling houses in furtherance of some criminal or unlawful object. This is another reason where the restriction or regulation of the buisness is an exercise of police power." This case was afterwards appealed to the Supreme Court of the United States as reported in the 154 U. S. 626. The judgment of the Supreme Court of Wisconsin was reversed. The Supreme Court of the United States do not discuss the case in the opinion any further than to say it was reversed on the authority of *Welton v. State*.

The decision in the case of *State v. Whitcom* deals with the validity of an act passed by the Wisconsin legislature requiring peddlers to procure a license and pay a fee therefor. Veterans of the Civil War and a number of others were exempted from the operation of the act. The court referred to two former cases decided by it, which leave the question as to whether a license tax could be exacted under the provisions of the Wisconsin Constitution in doubt and in view of the fact that that matter had not been argued in this case and the further fact that an expression on it was not necessary to the decision, the court refused to pass on it.

It was held that it was immaterial whether the license fee required under this law were viewed as

a tax or an exaction under the police power, as in either event the law would be void. If viewed as a tax it could not be sustained unless it was uniform upon the same class of subjects. If viewed as an exaction under the police power, it could not be sustained since it denied the equal protection of the laws, even though its object was to protect the public against irresponsible and deceitful traders. In the course of the opinion the courts say: "In considering the exemptions or partially disabled veterans of the civil war a quite unanswerable question arises, why, whether for purpose of taxation of police, they should be exempted any more than equally disabled veterans of other wars." And further on in the opinion it is said: "It seems neither necessary nor wise to carry further a critical analysis of this statute. We have pointed out several respects in which it fails to impose its penalties upon persons not distinguishable from the appellant by any legitimate classification. It therefore denies him the equal protection to which, both by Federal and State constitutions he is entitled, and cannot be valid as against him whether its purpose be taxation or regulation of conduct."

None of the other state constitutions contains a provision at all similar to the provision contained in the organic law of Alaska. A review of the various constitutional provisions limiting the power of taxation and the decisions thereunder discloses the fact that the courts have construed these provisions



just as they were written. In many of the state constitutions the provision relating to uniformity is not by its terms limited to property taxes, but like the Alaska provision is so worded as to apply to all taxation alike, and wherever such is the case it will be observed that the courts have generally, if not universally, held that the provision related to all taxation regardless of the character of the tax and that license taxes in order to be valid must be uniform in compliance with the constitutional provision.

It will be noted that no state constitution contains a provision similar to that found in the Alaska Organic Law providing that "all taxes" must be assessed according to value. The provisions in all the state constitutions requiring assessment according to value are expressly by their terms limited to taxes on property, and being so limited, the provisions can not and do not become material in discussing the validity of a license tax. But in the case of these provisions the courts also have given them effect according to, and construed them in accordance with, the exact language employed. While the language employed differs more or less in each case all these provisions provide substantially that property taxes shall be levied according to the value of the property taxed. And wherever a provision of this character exists the courts have held that the power of the legislature in connection with the assessment of property taxes is limited to taxes assessed according to value. That is to say, all specific property



taxes are done away with and such taxes are in all cases required to be ad valorem.

Since the decisions of the various state courts under these varying constitutional provisions do no more nor less than construe these provisions in accordance with the exact language employed, they do not and can not furnish any authority under which a construction can be placed upon the provisions of the Alaska Organic Act, which is not in accordance with its exact language. The Organic Law of Alaska provides that "all taxes" shall be uniform upon the same class of subjects. In this respect it is similar to the organic law of many of the states. The provision applies to all taxes. No distinction is made between license taxes and property taxes. It refers to "all taxes," that is to say, each and every kind of a tax and since a license tax is a tax, it must, in order to be valid, conform to the requirement of uniformity, and this is in accord with the decisions of the state courts rendered under similar constitutional provisions. But the provision in the Alaska Organic Act does not stop here, it requires more than uniformity. The language is, "all taxes shall be uniform upon the same class of subjects and the assessments shall be according to the actual value thereof. Under this provision then all taxes must be based upon an assessment and this assessment must be according to the actual value of the thing which is the subject of taxation. No state constitution contains the provision that all taxes must be

assessed according to the actual value of the thing taxed. This provision is peculiar to the Alaska Organic Law. Many state constitutions provide that all property taxes shall be levied according to actual value, but none, that *all* taxes shall be so levied, or that any tax, other than property taxes, shall be so levied, ~~or that any tax, other than property taxes, shall be so levied.~~ Apply the rule of decision applied by the state courts under the provision that all taxes must be uniform to the provision in the Alaska Organic Law. It follows that all taxes which are not assessed according to the actual value of the thing taxed are void, for as was pointed out in discussing uniformity clauses, license taxes are taxes, and being taxes are embraced within the term "all taxes" which is at once the most comprehensive and the most all inclusive of any term that Congress could have employed. If this language does not include license taxes, it is difficult to conceive of any language that would have been broad enough to include them. The statement contained in the Alaska Organic Act is equivalent to the statement that no tax shall be collected which is not uniform upon the same class of subjects, and which has not been assessed according to the actual value of the thing taxed, and since no tax, except an ad valorem property tax, can conform to these provisions that is the only tax that can be levied and collected under the Alaska Organic Law. It may here be added that the ad valorem system of taxation is the only safe, reasonable

and just system. Under it property is taxed and not the use of it. Unlike the license tax system, it does not place a premium upon idleness at the expense of industry and where it is levied with uniformity it distributes the burden of taxation equally and fairly.

It is urged that the provision requiring assessment according to value can not have been intended to apply to license taxes because these taxes can not be assessed according to value. It is true that license taxes cannot be assessed according to value, but it does not follow that for this reason they can be levied under a provision in the Organic Law requiring "all taxes" to be assessed according to value. It simply follows that license taxes can not be imposed. To contend otherwise leads to the most ridiculous conclusions for if license taxes can be assessed under this provision for the reason that its terms are such that a license tax can not conform to it, then it must follow that any tax can be assessed which is of such character that it can not conform to the requirements of the provision and can not be brought within its terms.

A specific property tax which differs from a license tax only in that it is a specific tax on property whereas the latter is a specific tax on occupations, can not be made to conform to the requirements of this provision, for while it is a tax on property it is a tax of so much per article without reference to the value of the article, just as an occupation tax is a tax of so much on a given occupation without ref-

erence to the value of the occupation. It is this that makes it a specific tax. If a specific tax were made to conform to the constitutional requirement so as to be assessed according to value, it would cease to be a specific tax and become an ad valorem tax. No specific property tax therefor can conform to this requirement. Hence, if the provision is to be so construed as not to apply to taxes that can not be made to conform to it, specific property taxes are not within its terms and can be levied notwithstanding a provision that "all taxes" must be according to value.

What is said of specific property taxes is true of each and every kind of a tax, except an ad valorem property tax, for no tax except an ad valorem tax is assessed according to value. If therefore all kinds of taxes that can not be made to conform to this provision are to be considered as not coming within it and are to be allowed notwithstanding the fact that they are assessed according to value, then any kind of a tax whatsoever, be its character what it may, may be levied notwithstanding the fact that it is not assessed according to value. That is to say, since no tax, except an ad valorem property tax, can be levied according to value, specific property taxes, license taxes and every other conceivable kind of a tax may be levied notwithstanding the constitutional provision that all taxes must be levied according to value, if it be conceded that the requirement of assessment according to value was not intended to apply



to taxes that are of such a character that they can not be made to conform to it. The adoption of this view therefore would entirely destroy the effect of the provision. It would be equivalent to saying that a provision that taxes must be assessed according to value applies only to ad valorem property taxes for these are the only taxes that can be made to conform to this provision. All taxes, if this contention is regarded as sound except ad valorem property taxes can of course be levied because these can not conform to the provision and ad valorem property taxes can of course be levied because these can not exist without conforming to the provision, so the provision becomes entirely meaningless and is left without any effect whatsoever.

The idea that the term "all taxes" does not include license taxes finds its origin in a wrong conception of what a license tax really is. It results from a confusion of license fees exacted under the police power with license taxes. There is nothing occult or mysterious about a license tax. It is not different from any other kind of a tax, it is simply a specific tax upon occupation, just as a specific tax on property is a specific tax on property. Money exactions under the police power may be allusive and peculiar in character because of the elasticity of the police power, but these characteristics do not apply to license taxes.

Viewed therefor from the standpoint, either of reason or authority, the term "all taxes" must be



held to include license taxes and since the tax sought to be collected in this proceeding is not uniform upon the same class of subjects, is not based upon any assessment whatsoever and is not assessed according to value, it cannot be sustained under the provision in the Organic Act.

But the learned trial judge expressed the opinion that express authority had been conferred upon the legislature to exact a license tax. If such express authority exists it must exist because of the following provision in the organic act:

“That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the act entitled ‘An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes,’ approved January twenty-seven, nineteen hundred and five, and the several acts amendatory thereof: Provided further, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses.”

In the first place it will be observed that this provision does not contain a grant of power. The provision taken as a whole is a limitation upon the power of the legislature. Congress had enacted a law with a view of collecting revenue to meet the expense of the general government in administering the law in the Territory. It was deemed desirable to keep this law in force accordingly a provision was inserted against its repeal by the Territorial legislature. But in order that this provision might not be given a broader construction than was intended for it, it was provided:

“That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses.”

The clause does not in any sense contain a grant of powers but is a mere statement inserted to prevent a provision containing a limitation upon the powers of the legislature from receiving too broad a construction.

Viewed, however, as an express grant of powers this clause does not confer the power to impose a license tax. A grant of power to require license authorizes the exaction of licenses under the police power for the purpose of regulation, but does not authorize the exaction of license taxes under the taxing power. The right to require the latter exists if it exists at all under the taxing power and must be exercised in subordination to the limitations placed upon that power by the organic law, the form-

er exists under the police power and is controlled by the limitations placed upon that power by the organic law, without any reference whatsoever to the limitation relating to the exercise of the taxing power. The right to require a license and the right to impose a license tax are separate and distinct rights, bearing no relation to one another; and a grant of the former does not include the latter. Upon this the authorities are agreed.

*Sunset Telephone and Telegraph Co. v.*

*City of Medford* 115 Fed. 202.

*In re Laundry Licenses* 22 Fed. 701.

*Clark vs. Brunswick*, 43 N. J. Law 175

*Cache County v. Jensen* 61 Pac. 303.

*State v. Smith* 35 Atl. 506 (Conn.)

52 Am. St. Rep. 301.

The case of the Sunset Telephone and Telegraph Company v. City of Medford arose before Judge Bellinger. The charter of the City of Medford, Oregon provided as follows:

“The city council shall have power to license, regulate or prohibit telegraph and telephone companies using the roads, streets, or alleys of the city and road district, and to fix the compensation which such companies shall annually pay to the city for such license or privilege. But no license shall grant an exclusive right to any such company.”

Under this provision in the charter the city passed an ordinance requiring telephone

companies to pay one hundred (\$100.00) dollars per annum as a license fee. The court held that the fee was so large that it was obviously a revenue provision and that it was therefore not within the authority conferred on the city by its charter. In passing upon the ordinance the court say:

“The ordinance complained of provides that no person shall engage in the telephone business, or place in or occupy any of the streets with its poles and wires, without paying, for an annual license so to do, the sum of \$100, and, when this sum is paid, the city recorder shall issue a license to the person, authorizing and permitting said person or company to engage in the telephone business within said city for the period of one year; that the person or company paying said license fee, during the year for which they have paid such license, shall have a right to occupy the streets and alleys with his or its poles and wires, etc. This is a revenue provision, and is not within the authority conferred upon the city by its charter. ‘The power to license, as a means of regulating a business implies the power to charge a fee therefor sufficient to defray the expense of issuing the license, and to compensate the city for any expense incurred in maintaining such regulation. Whenever it is manifest that the fee for the license is substantially in excess of what it should



be, it will be considered a tax, and the ordinance imposing it void.' Laundry License Case (D. C.) 22 Fed. 701. If the city has authority, under section 102 of the charter, to fix the compensation which shall be annually paid for such license or privilege to use the roads and streets of the city, then the city might have required the payment of the sum fixed by the ordinance for such use. But it did not do this. From the averments of the bill, it appears that the complainant has the right to use the streets of the city, by permission of its lawfully appointed officers. If so, the city cannot add new conditions to the grant after the company has accepted it and established its plant. If by the power to fix compensation is meant the compensation that the city is to receive for the license regulation, the case is within the rule of the Laundry License Case (D. C.) 22 Fed. 701, and the compensation to be fixed must not go beyond the expense of issuing the license and maintaining the license regulation. In short, the city cannot add to the conditions upon which the right to use the streets was granted to the complainant, and while it may exact compensation for the license, it cannot, under the power given in its charter, make such compensation a matter of revenue."

The case of *In Re Laundry License* arose in Oregon. A city ordinance of the City of Portland



required the proprietors of wash houses to pay a quarterly fee of five dollars, making an annual fee of twenty dollars. The charter of the city of Portland authorized the city to regulate wash houses, laundries, and the like, and another subdivision in the charter authorized the city to license and regulate all such callings, trades and employments not prohibited by law, "as the public good may require." The question before the court was whether these provisions in the charter authorized the license fee of twenty dollars per annum exacted from the proprietors of wash houses. The matter arose on a petition for a writ of habeas corpus. The petitioner had been convicted for violation of the Portland ordinance and, the case arose before Judge Deady. Judge Deady held that the city had under the provision quoted the power to license laundries, but that a license could be exacted only in connection with the exercise of the power to regulate, and that it could not be used as a pretense for raising revenue. The Court held that one dollar per year would be ample to re-imburse the city for registering a license and that the fee of twenty dollars must be regarded as a revenue measure and therefore void.

The case of *Clark v. New Brunswick* arose in the State of New Jersey. The city charter of the city of New Brunswick empowered the city council to pass ordinances to license and regulate cartmen, hawkers, peddlers, auctioneers, pawnbrokers, junk and shop keepers and others. Under this grant of

powers the city council of New Brunswick passed a license law very similar to the act passed by the Territorial Legislature. The act was held void on the ground that the power to exact a license tax was not conferred upon the city. In passing upon this matter, the court, speaking through Judge Van Sychel say:

“Under such grant of power it has been repeatedly held in this state, the right of taxation for revenue purposes is not conferred. It is purely a police power and must be exercised for the purpose of regulation. The city may be incidently benefited by the imposition of fines and penalties, but they must be reasonable and appropriate to the regulation of the various pursuits enumerated. Any attempt to establish a fiscal scheme under the grant is without authority by law.” Again the court quoting with approval from a former decision rendered by the Supreme Court of New Jersey say: “When authority is given to require the possession of a license as a condition for selling, a reasonable fee, to cover probable expense can be demanded, but the exaction of sums in excess of such expenses and graduated by the amount of business done can be nothing else than a tax upon such business.”

The case of Cache County v. Jensen arose in the State of Utah. The laws of the state authorized counties to require licenses for the purpose of reg-

ulation and revenue. Cache County imposed a license on those ~~grounds~~ <sup>ranges</sup> in herding sheep. The amount of the license fee exacted depended upon the number of sheep and was so large that it was evidently intended as a means of raising revenue. The ordinance requiring the license did not provide for any regulation so that it was on its face a revenue measure solely.

The Supreme Court of Utah held that under a grant of powers to the counties empowering them to require a license for the purpose of regulation and revenue, the counties had no right to require a license for the purpose of revenue only; that the grant merely empowered the counties to license for the purpose of regulation and that if revenue resulted incidently this was permissible.

The Court say: "So a right to license a business or occupation does not imply a right to exact a tax merely for revenue and where the object is revenue the power to license for that purpose must be conferred in unequivocal terms. "License" in general implies privilege and regulation and the imposition of it falls within the police power of the state.

In the case of *State v. Smith*, the court had before it an ordinance of the City of Bridgeport. The charter of the town of Bridgeport authorized the City of Bridgeport to license cartmen, truckmen, hackmen, butchers, bakers, petty grocers, hucksters and common victualers under such restrictions and

limitations as said common council might deem necessary and proper to the health of the city, and to make other ordinances relative "to any and all subjects which shall be deemed necessary and proper for the protection and preservation of the lives of the citizens." The city council under this grant of power enacted an ordinance requiring a license from all milkmen. The court held that this ordinance was not authorized, under the general welfare clause, nor under the provision above referred to and was therefore void. The court say:

"The right to license the pursuit of a lawful business, which as usually carried on does not endanger the public health or safety, and thus to limit the number of those who may engage in it, is one of the highest powers of sovereignty. When conferred upon a municipal corporation, the grant can not be extended by any doubtful implication."

For the various reasons assigned the judgment of the lower court should be reversed. The act of the Legislature creates no civil liability, nor is a civil remedy provided and the act itself is void in that it requires the doing of that which is impossible and is so indefinite and uncertain in its provisions that it can neither be complied with nor enforced; in that it confers upon the court or Judge arbitrary power to deny to those engaged in useful occupations the right of following such occupations, and to deny persons possessed of property the right to use and

enjoy such property, in violation of the provisions of the federal constitution; in that under the provisions of the act, those whose incomes are derived from mining and exceed \$5000 are discriminated against in favor of those whose incomes are derived from some other source and those whose incomes derived from mining are less than \$5000, in violation of the provisions of the federal constitution; and in that it is not uniform upon the same class of subjects, is not based upon an assessment and is not assessed according to value, in violation of the provisions of the Organic Act of the Territory of Alaska in that regard.

Respectively submitted,

HELLENTHAL & HELLENTHAL,

Attorneys for Plaintiff in Error.

CURTIS H. LINDLEY,  
of Counsel.







NO. 2727

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In the  
United States  
Circuit Court of Appeals  
For the Ninth Circuit

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ALASKA MEXICAN GOLD MINING COMPANY,  
a Corporation,

Plaintiff in Error,

VS.

TERRITORY OF ALASKA,

Defendant in Error.

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UPON WRIT OF ERROR TO THE DISTRICT  
COURT FOR ALASKA, DIVISION  
NUMBER ONE.

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Brief for the Defendant in Error

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J. H. COBB,

Chief Counsel

For the Territory of Alaska.

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## STATEMENT OF THE CASE.

This is one of the suits brought for the purpose of testing the validity of the revenue laws of the Territory of Alaska, of which there are four others here pending.

The controversy was submitted as an agreed case under the provisions of Chapter 28 of the Alaska Code of Civil Procedure.

From the agreed case it appears that the Alaska Mexican Gold Mining Company was a corporation, duly incorporated and carrying on a mining business between July 31st 1913 and January 1st, 1914, and during that period had a net income of \$59,655.77, and that for the calendar year of 1914 it recovered a net income of \$119,953.49, upon which sums the Territory of Alaska demanded and obtained judgment for  $\frac{1}{2}$  of 1 per cent as provided in the revenue act of the Territory, known as Chapter 52 of the Session Laws of Alaska 1913. It further appears from the agreed statement that the Alaska Mexican Gold Mining Company fully complied with the provisions of the Act of Congress providing for taxes on business and trade in Alaska by paying thereunder a tax of \$3.00 per annum on each of its one hundred and twenty stamps.

The court held that under the statement the defendant was liable for the license tax laid by the Territory of Alaska in Chapter 52 Session Laws of

1913; and that the taxes so due may be recovered in a civil action under the provisions of Chapter 76 Session Laws of 1915, and rendered judgment in favor of the Territory and against the defendant for the proper amount under said rulings. (Record pages 21-22). The defendant thereupon assigned errors (Record pages 25-26) and brought the cases to this court upon Writ of Error. The errors assigned are four (Record pages 25-26), and as we understand it, raise the following questions when taken in conjunction with the Bill of Exceptions, namely:

1st—That no civil liability was created by the provisions of Chapter 52 of the Act of the Territorial Legislature, Session Laws 1913, and that the provisions of Chapter 76 of the Session Laws of the Alaska Legislature of 1915 providing for the collection of the back taxes then due by civil suit, was void because retroactive.

2nd—That Chapter 52 of the Act of the Territorial Legislature of 1913 is void so far as the defendant is concerned because it was impossible for the defendant to comply with the provisions of said act and apply for and obtain a license as therein provided, because it could not know and therefore pay in advance, the  $\frac{1}{2}$  of 1 per cent on its net income, and that a court, in a prosecution for failure to comply with it, would be powerless to impose a sentence because the amount fixed as a penalty is so indefinite

and uncertain that no sentence could be imposed by the court.

3rd—That the said Territorial Act is void because it confers arbitrary power upon the court or judge to deny the owner of a mining claim or claims the right to work and operate said claims, and thereby gives it the power to confiscate the property of the defendant engaged in a lawful occupation.

4th—That the license tax imposed by the said Act of the Alaska Legislature is a revenue measure pure and simple and is in conflict with that provision of Section 9 of the Organic Act which reads: "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws and the assessment shall be according to the actual value thereof," and that consequently the Alaska Legislature had no power to raise revenue by a license tax.

5th—That the said Act of the Territorial Legislature was void in that it is not uniform upon the same class of subjects, because of the exemption from taxation of the first \$5000 of the net income.

## ARGUMENT

In as much as this is a test case, in which, if for any reason, assigned or otherwise, the Territorial Revenue Bill attacked is invalid, it is in the interest of public policy that it be so declared, we will proceed to discuss the questions in our own way without seeking to follow too closely and *seriatim* the

points discussed in the brief of the plaintiff in error.

1st—The first question raised is that there was no civil liability created by the revenue act of Alaska 1913, and that the provision for civil suit for all such taxes, found in the Revenue Act, Chapter 76 Session Laws of Alaska 1915, is void because retroactive.

This contention will be seen to be wholly untenable by a mere glance at the law in question. Section 3 of the Act (Session Laws of Alaska 1913, pages 110-111) provides that any person, firm or corporation convicted of a violation of the act shall be fined a sum equal to the license required for the business, trade or occupation, and for a second conviction, a sum double the amount, and then follows this: "Provided further, however, that in the event of any person, firm or corporation shall fail to pay the license required by the provisions of this Act and shall further fail to pay any fine that may be imposed by a court of competent jurisdiction, for such failure to so pay said license fee or taxes required by the provisions of this act, judgment may be entered against such firm, person, or corporation and process shall be issued for the enforcement of the collection of said judgment and in the same manner as judgments in civil proceedings." Whether a civil action would lie under this provision is not material or necessary to consider or determine. A liability for the payment of money was created. By Section 4 of Chapter 76 Session Laws of Alaska 1915, page



189, a civil remedy was given, and that remedy by Section 7, page 190, was made applicable for taxes due under the Act of 1913. That a statute which merely gives a new remedy to enforce an existing right is not retroactive within the meaning of the constitution, is too well settled and too obvious to require either argument or authority to support it.

2nd—If the defendant had attempted to comply with the law and found it impossible to do so, or if he was resisting a sentence to be imposed after a conviction, the objections made under this heading might at least be admissible of some argument. In reply to it, it is only necessary to say that many of the persons and corporations, including among the latter the greatest metal producer in the Territory, have complied with the law and found no difficulty therein. The language of the Act (see Session Laws of Alaska 1915, page 107), is as follows: "That any person or persons, corporation or company prosecuting or attempting to prosecute any of the following lines of business within the Territory of Alaska, shall first apply for and obtain a license so to do from the District Court or a subdivision thereof in said Territory, and pay for said license for the respective lines of business and trades as follows, to-wit: .....mining,  $\frac{1}{2}$  of 1 per cent on the net income over and above \$5000.00 per annum." When this Act was passed, there was in force and had been in force since 1898, an Act providing for a license tax on business in Alaska (See

Compiled Laws of Alaska, page 782) which reads as follows: "That any person or persons, corporation or company prosecuting or attempting to prosecute any of the following lines of business within the District of Alaska shall first apply for and obtain a license so to do from the District Court or a sub-division thereof in said District, and pay for said license for the respective lines of business and trade as follows, to-wit:" It will thus be seen that the language used in the Act of the Alaska Legislature was copied from the Act of Congress.

Now among the lines of business taxed by the Act of Congress, were the following: Fisheries, Salmon Canneries, 4c per case; Salmon Salteries 10c per barrel; Fish Oil Works 10c per barrel); Fertilizer Works 20c per ton; Mercantile Establishments doing a business of \$100,000.00 per annum, \$500.00 per annum; doing a business of \$75,000.00 per annum, \$375.00 per annum; doing a business of \$50,000.00 per annum, \$250.00 per annum; doing a business of \$25,000.00 per annum, \$125.00 per annum; doing a business of \$10,000.00 per annum, \$50.00 per annum; doing a business of under \$10,000.00 per annum, \$25.00 per annum; doing a business of under \$4,000.00 per annum, \$10.00 per annum. Now it is manifest that the taxes upon the fisheries and upon the mercantile establishments could only be ascertained and paid at the end of the year for which they were paid, and at the time the Alaska Legislature passed the bill laying the indeterminate tax

upon mines, Alaska had had fourteen years experience under the Tax Act of Congress and there had never been any trouble or difficulty of any kind in ascertaining and collecting the tax upon the salmon canneries, salmon salteries, fish oil works, fertilizers or mercantile establishments. All that was necessary under the Act of Congress, and all that is necessary under the Act of the Alaska Legislature, is to apply a little common sense and reason to it, and it is perfectly easy to see that in the cases in which the amount of tax is made to depend upon the operations of the line of business during the year for which the tax is laid, it shall be calculated and paid at the end of the year, though the Legislature did not expressly so provide.

3rd—It is contended by the defendant that the Territorial Act is void because it confers arbitrary power upon the court or judge to deny the owner of a mining claim the right to work and operate said claim and therefore confers upon them the power to confiscate property. To say the least, this is a rather strange objection to come from a defendant that has refused to apply for a license or to pay its taxes when ascertained. No such difficulty or objection has ever arisen under the Act of Congress, and indeed could not arise. The act of the court in issuing the license is a ministerial act and when the person subject to the payment of the taxes has tendered the same, the court has no function to perform except to issue the license.

4th—It is next contended that the license tax imposed is a revenue measure pure and simple and as such is in conflict with that portion of Section 9 of the Organic Act which provides “All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws and the assessment shall be according to the actual value thereof.” In answer to this argument it is only necessary to point out that the Alaska Legislature possessed legislative power extending to “all rightful subjects of legislation”; and it will hardly be denied that the raising of revenue by levying license taxes on business pursuits is “a rightful subject of legislation.” (25 Cyc Page 599). And, as a matter of fact, the provision quoted from Section 9 of the Organic Act has absolutely no application to license taxes, for:

“The constitution of many of the states contain the requirement that taxation shall be equal and uniform, that all property in the state shall be taxed in proportion to its value, that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, or that the legislature shall provide for an equal and uniform rate of assessment and taxation; and in the face of such provisions a tax law which violates the prescribed rule of equality and uniformity is invalid, although there is sufficient difference in the wording of the different provisions to ac-



count for some lack of uniformity in the decisions as to what constitutes a violation of their requirements. The requirement does not apply to every species of taxation, and does not restrict the legislature to the levying of taxes upon property alone. The restriction relates only to the rate or amount of taxation and its incidence upon taxable persons and property, and does not limit the legislature in regulating the mode of levying and collecting the taxes imposed, and it also relates only to property within the state, and neither the statutes of another state nor the action of its taxing officers can affect the question. In the absence of such a constitutional requirement it is not essential to the validity of taxation that it shall be equal and uniform, and in such a case a tax law cannot be declared unconstitutional merely because it operates unequally, unjustly, or oppressively.

The requirement of equality and uniformity applies only to taxes in the proper sense of the word, levied with the object of raising revenue for general purposes, and not to such as are of an extraordinary and exceptional kind, or to local assessments for improvements levied upon property specially benefitted thereby, or to other burdens, charges, or impositions which are not properly speaking taxes; and further, such a constitutional provision is to be restricted to taxes on property, as distinguished from such as



are levied on occupations, business, or franchisees, and in inheritances and successions, and as distinguished also from exactions imposed in the exercise of the police power rather than that of taxation.

The principle of equality and uniformity does not require the equal taxation of all occupations or pursuits, nor prevent the legislature from taxing some kinds of business while leaving others exempt, or from classifying the various forms of business, but only that the burdens of taxation shall be imposed equally upon all persons pursuing the same avocation, or that if those following the same calling are divided into classes for the purpose of taxation, the basis of classification shall be reasonable and founded on a real distinction, and not merely arbitrary or capricious. To this extent also, and no further, the principle applies to license fees or taxes imposed under the police power or for the better regulation of occupations supposed to have an important public aspect."

(37 Cyc. p. 729-33.)

(See also *Binns vs. U. S.*, 194 U. S. 436.)

5th—The last point involved directly in the Bill of Exceptions and in the Assignments of Error, is that the Tax Act of 1913 is void because of the exemption from taxation of the first \$5000.00 of the net income, and it is said that it is not therefore uniform upon the same class of subjects. Why not?

The Act merely classifies the incomes which shall pay and those which shall not pay, according to a uniform rule. The defendant gets an exemption on its first \$5,000.00 of net income exactly the same as the man whose income only equals, or is less than \$5000.00. (See 37 Cyc cited above.)

6th—There is another question not directly raised in this case, but which is involved in some of the others and is embodied in the agreed statement, which we deem it proper to briefly notice, though the question is treated more at length in the briefs of some of the other cases, namely: Is the Act of the Alaska Legislature approved April 29th 1915 and printed as Chapter 76 Session Laws of Alaska for that year, void because actually passed in the morning hours of April 30th 1915? If it is, then the question of the right to a money judgment might depend solely upon the provisions found in Chapter 52 of the Session Laws of 1913, already quoted. The facts upon which this contention is made are set forth in the agreed statement as follows:

“The second session of the legislature which passed chapter 76, Session Laws of Alaska, 1915, convened on the 1st day of March, 1915, at 12 o'clock noon; that on the 29th day of April, 1915, said legislature adjourned, sine die, at 12 o'clock midnight, according to the official time-pieces of said legislature, that it to say, the clocks hanging in the halls of the two houses of the legislature were stopped or turned back by the sergeant-at-

arms just prior to the hour of 12 o'clock midnight of April 29th, 1915, and thereafter between the hours of 3 and 4 o'clock A. M., sun time, of April 30, 1915, while the clocks in said halls of the legislature still indicated prior to midnight, being stopped or turned back as aforesaid, the said act, namely, chapter 76 of the Session Laws of Alaska, 1915, was finally passed by both houses of the legislature and approved by the governor and was enrolled and filed in the office of the Secretary of State for the territory as it now appears in the printed volume of Session Laws of Alaska 1915, Chapter 76; that the Governor of the Territory of Alaska did not call an extra session to pass said act."

To this contention there are two complete answers. First, the sole evidence to which the courts can look to ascertain what is the statutory law is the journals of the legislative body and the enrolled bills found in the office of the Secretary of State. These are conclusive upon the courts.

*Fields vs Clark*, 143 U. S. 649.

*Lyons vs Wood*, 153 U. S. 649.

*Harwood vs Wentworth*, 162 U. S. 547.

Second, As the Legislature for 1915 met at noon on March 1st, the sixty days to which it was limited by the Organic Act did not expire until noon of April 30th, and April 29th as a legislative day of twenty-four hours, actually ended at noon on April 30th.

*White vs Hinton*, 17 L. R. A. 66.

In conclusion we respectfully submit that the legislative power of the Territory of Alaska embraces "all rightful subjects of legislation" not in conflict with the constitution of the United States or the Organic Act itself; that the laying of license taxes is "a rightful subject of legislation," that not only is there nothing in the constitution or in the Organic Act prohibiting the exercise of this power, but that by Section 3 of the Organic Act the power to lay such taxes is expressly recognized and given; for after prohibiting the legislature from altering, amending, modifying or repealing certain laws, including the laws of the United States providing for taxes on business and trade in Alaska, it was "provided, further, that this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses."

It may be conceded that the revenue bill for 1913 under which the cause of action herein arose, is loosely and inartificially drawn; it may be conceded that there would have been great difficulty in enforcing it had the Territory actively attempted to do so. But there was no machinery of law provided by the Legislature of 1913 to enforce actively the revenue laws. As a consequence no revenue was collected except from those who complied voluntarily with the law. According to the reports of the Treasurer of Alaska 1915, there was paid in under the revenue laws of 1913, \$54,641.03. In 1915 at the second session of the Legislature the Governor was



authorized to appoint a chief counsel for the Territory of Alaska (see Senate Joint Resolution Number 6 approved April 29th 1915, Session Laws of Alaska 1915, page 197) and the Legislature made an appropriation to cover the expenses of the work, (See Session Laws of Alaska 1915 page 129); and by the provisions of Chapter 76 Session Laws of 1915, Sections 3, 4 and 7, it was made the duty of the legal counsel for the Territory to enforce the collection of both the current revenue and the back taxes that had accrued under the Act of 1913, and definite remedies and procedure were therein laid down.

We respectfully submit that none of the objections made to the validity of the laws under the taxes involved in this suit are sought to be collected, are tenable, and that the judgment of the District Court should be in all respects affirmed.

J. H. COBB,

Chief Counsel for the Territory of Alaska.



Case No. 2727.

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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ALASKA MEXICAN GOLD MINING COMPANY, a  
Corporation,  
vs.  
TERRITORY OF ALASKA,  
Plaintiff in Error,  
Defendant in Error.

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**Reply Brief of Plaintiff in Error**

Upon Writ of Error to the United States District Court of  
the District of Alaska, Division No. 1.

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HELLENTHAL & HELLENTHAL,  
Attorneys for Plaintiff in Error.  
CURTIS H. LINDLEY,  
Of Counsel.

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Filed this.....day of March, 1916.

F. D. MONCKTON, Clerk.

By....., Deputy.



Case No. 2727.

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*Defendant in Error.*

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REPLY BRIEF OF PLAINTIFF IN ERROR.

In response to the arguments advanced by counsel for the Territory, the following will be added to what has been said in regard to the various points in the opening brief:

I. *That the Act of the First Territorial Legislature which forms the Basis of the Present Proceeding Creates no Civil Liability.*

Counsel contends that because the fine to be assessed upon the first conviction under the Act is to equal the amount of the license, and because the fine to be

assessed upon a second conviction is to be double the amount of the license, and because of the further fact that a judgment may, after conviction duly had, be entered to enforce payment of the fine, the Act creates a civil liability.

Aside from the fact that a law providing for a fine to be imposed upon the conviction of a criminal offense in no sense creates a civil liability, counsel fails to call the attention of the Court to the fact that under the provisions of this Act a third offense is punished not only by a fine, but by imprisonment as well. For the first offense the penalty is a fine equal to the amount of the license, for the second offense the penalty is a fine equal to double this amount, and for the third offense the penalty is a fine equal to three times this amount and imprisonment of not less than thirty days nor more than six months. If these fines may be recovered in a civil proceeding there is no reason why a sentence of imprisonment may not be imposed under this law in a similar proceeding.

Not only is there no difference between a fine and a term of imprisonment in that both are imposed as punishment for an offense under the law and in that neither are assessed to wipe out a civil obligation, but in the present case the liability to both fine and imprisonment arose as the result of the same unlawful act. Here is found at least one of the reasons why the Act of the First Territorial Legislature creates

no civil liability and why the Act of the Second Territorial Legislature providing for the enforcement of these fines and terms of imprisonment by a civil proceeding is void.

Since this matter was fully gone over in the opening brief, it will not be further discussed here, except to reply to the further contention of counsel that the provision empowering the Court to enter judgment for the amount of the fine after conviction has the effect of creating a civil liability.

It will be noted that under the Act both natural persons and corporations are upon conviction made liable to fine and imprisonment. It is provided that after a conviction has been had and a fine has been imposed, the defendant may be imprisoned with a view of enforcing the payment of the fine or a judgment may be entered against him which may be collected as other judgments. Of course a corporation could not be imprisoned, so that a fine assessed against it could not be collected or enforced by a threat of imprisonment; accordingly the provision is added providing for the collection of a fine by entering a judgment to be collected as other judgments. The law does not provide that this judgment may be entered in a civil proceeding, but it provides that this judgment may be entered after a conviction has been duly had and a fine imposed, and after the defendant has failed to pay this fine when imposed. This is not an unusual provision to be found in criminal stat-



utes, and in no case does it create a civil liability. Its effect is merely to provide an additional method for the enforcement of the penalty imposed under the provisions of the act of which it forms a part.

Counsel makes the statement that a statute which merely gives a remedy to enforce an existing right is not retroactive within the meaning of the Constitution. This much is conceded, but it is contended that the Act of the Second Territorial Legislature is not such a statute, for the reasons pointed out in the opening brief.

In addition to what has been said upon this subject in our opening brief, it may be added that if this Act were considered as a valid act the Territory would be authorized not only to recover the fine imposed for the first violation, which is the amount of the license, but also the fine and imprisonment imposed for each subsequent violation, since the act provides that each day or part of a day that a person, firm or corporation does business or attempts to do business in violation of its provisions, shall constitute a separate offense, punishable in the case of the first and second offense by fine and in that of the third offense by both a fine and imprisonment. It is not a difficult matter to imagine what the effect would be if counsel's contention were regarded as correct.

2. *The Provisions of the Act are such That It is Impossible Either to Comply Therewith or to Enforce Them.*

Counsel makes the statement that if the defendant had attempted to comply with the law and found it impossible to do so, or if it were resisting a sentence imposed after conviction, these objections might be admissible of some argument. Counsel does not point out how one engaged in the fishing or mining business could make an attempt in one case to predict the amount of its net income a year in advance, and in the other case the number and kind of cases of fish that he might at a future time be able to catch and can. Nor does counsel point out how a conviction for a violation of the act could ever have been had or how a sentence could ever have been imposed so that anyone could ever be placed in the position of resisting such a sentence. There is no rule of law requiring anyone to attempt the impossible.

Counsel says that in reply to the argument made it is only necessary to say that many persons and corporations, including among the latter the greatest metal producer in the territory, have complied with the law and found no difficulty therein. There is nothing in the record upon this subject, nothing to show that anyone has ever complied with this law. This much is certain, that no one could comply with it unless such a one possessed the gift of prophecy. That some possessed this gift and could, therefore,

comply with the law is a proposition that will be neither admitted nor denied.

Counsel says that the greatest metal producer in the Territory has complied with the law. Who this metal producer is we are not advised. All the metal producers in southeastern Alaska, including the great Treadwell mine, are under an agreement with counsel awaiting the decisions in the cases now pending before complying with the demands of the Territory. Aside from these there are no metal producers in Alaska except the copper mines to the westward. The owners of these may be gifted with the gift of prophecy, but it would seem unfair to blame the operators of the fisheries and the quartz mines for not being similarly qualified to look into the future. These may, like Tennyson, look into the future as far as human eye can see, but the extent of the income to be derived from as fickle a business as mining, and the extent of a fish pack, depending upon such an uncertainty as one's ability to catch fish, is beyond their range of vision.

Counsel says that all that is necessary under the Act of the Territorial Legislature "is to apply a little  
"common sense and reason to it and it is perfectly  
"easy to see that in the cases in which the amount of  
"tax is made to depend upon the operations of the  
"line of business during the year for which the tax  
"is laid, it shall be calculated and paid at the end of  
"the year, though the Legislature did not expressly

“so provide.” The difficulty with applying this method of payment, however, lies in the fact, not only that the Legislature did not expressly provide for it, but in the further fact that the Legislature has expressly provided against it.

Section 3 of the Act provides:

“That any person, corporation or company doing or attempting to do business in violation of the provisions of this Act, *or without first having paid the license therein required*, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined, etc.”

Under this provision, therefore, it will be noted that it is not only necessary to apply for and obtain a license in advance, but also to pay the amount required in advance. If this is not done the person or corporation attempting to do business violates the provisions of the Act and becomes subject to the penalties imposed.

In order to follow the suggestion of counsel, therefore, it would not only be necessary to add an additional provision to the Act, but also to strike out one or more of the provisions actually contained in the Act itself. That all this cannot be done by the application of common sense and reason requires no argument. The reason and common sense should have been applied at the time the Act was enacted.

3. *The Act Confers Arbitrary Power upon the Court in Relation to the Matters Indicated in the Opening Brief.*

In reply to the argument advanced in the opening brief upon this proposition, counsel says, "To say the least, this is a rather strange objection to come from a defendant that has refused to apply for a license or to pay its taxes when ascertained." This objection may be strange, but it is equally true that the doctrine that one must comply with a void act before he will be heard to assert its invalidity, has a very unfamiliar ring to it. Counsel's contention is that one is estopped from questioning the validity of a law unless he has first complied with it. It is but necessary to state this proposition in order to refute it.

Nor can very much blame be attached to a mining or fishing concern for not paying the amount of its license taxes at the end of the season when they can be ascertained. In the case of the mines they cannot be ascertained until the close of the year, and in the case of the fisheries they cannot be ascertained until the close of the fishing season. In order to pay the taxes when ascertained, therefore, the mining or fishing concern would be obliged to pay the amount of the license for the first day's violation, double the amount for the second day's violation, three times the amount for the third day's violation, and in addition to this, surrender itself to suffer imprisonment for a period of not less than thirty days nor more than six



months, and these cumulative fines and terms of imprisonment would have to be calculated by considering each day in the year a separate offense in the case of the mines, and each day composing the fishing season a separate offense in the case of the fisheries. The fact that the Territory in bringing these actions has confined itself to a demand for the penalty imposed for the first day's violation does not alter the fact that in addition to this penalty the defendant is under the law also liable to all the other cumulative penalties. Nor would a payment of the amount demanded in these actions wipe out the criminal liability resulting from a violation of the Act. Nowhere is it provided that this would be the result, nor is anyone given the power to compromise these crimes.

Counsel says: "No such difficulty or objection has ever arisen under the Act of Congress, and indeed could not arise." This statement of counsel is quite true, and the reason for it is that *the Act of Congress referred to does not contain the provision to which this objection is made*. The first paragraph of the Act of the Territorial Legislature was copied from the Act of Congress relating to license taxes, but the paragraph conferring this arbitrary power upon the Court or Judge was not copied from that Act but was copied from the Act of Congress relating to licenses for the sale of intoxicating liquors. The Act of Congress relating to the sale of intoxicating liquors

is published as Section 2572 of the Compiled Laws of Alaska and is as follows:

“That the licenses provided for in this Act shall be issued by the Clerk of the District Court or any sub-division thereof, in compliance with an order of the Court or Judge thereof duly made and entered, and the Clerk of the Court shall keep a full record of all applications for licenses and of all recommendations for and remonstrances against the granting of licenses and of the action of the Court thereon.”

Section 2 of the Act of the Territorial Legislature is a copy of the section just quoted and was not copied from any provision contained in the Act of Congress relating to licenses in connection with trades or business.

In order to refute the statement of counsel that the Court in issuing a license under this provision is performing a mere ministerial act and has no function to perform upon the tendering of the money except to issue the license, it is but necessary to call attention to the language of the provision. Under it the Court or Judge does not issue the license at all. The license is issued by the Clerk. The Clerk is made the ministerial officer by whom the ministerial duties are performed; but he cannot act until the Court or Judge has made an order.

The Act provides for action by the Court, but this action is based upon recommendations and remonstrances. Since this matter was fully discussed in our opening brief it will not be further referred to here.

4. *That the Tax Sought to be Collected Does Not Conform to the Requirements in the Organic Act Relating to Uniformity and Assessment According to Value.*

According to the contention of counsel for the Territory in the discussion of this matter, the fact that the authority of the Legislature is extended to all rightful subjects of legislation gives the Territorial Legislature a right to impose and collect license taxes regardless of whether these license taxes conform to the other provisions and limitations contained in the Organic Act itself. If the provisions extending the power of the Legislature to all rightful subjects of legislation stood alone, and no limitations were imposed upon the taxing power, it must be conceded that any tax not laid in violation of the provisions of the Federal Constitution could be imposed and collected. But such is not the case in Alaska. While the authority of the Legislature extends to all rightful subjects of legislation, it is expressly provided that "All taxes shall be uniform upon the same class of subjects, and shall be levied and collected under general laws and the assessment shall be according to the actual value thereof."

The effect of this provision in the Organic Act and the decisions relating to similar provisions contained in the various State constitutions, have been fully discussed in our opening brief. To the arguments there advanced and the authorities cited and

discussed counsel makes no reply. The brief of counsel contains the bald statement, "And as a matter of fact the provision quoted from Section 9 of the Organic Act has absolutely no application to license taxes." No reason is assigned for this statement and no authorities cited except a quotation from Cyc., which contains the following:

"The principle of equality and uniformity does not require the equal taxation of all occupations or pursuits nor prevent the Legislature from taxing some kinds of business while leaving others exempt, or from classifying the various forms of business, but only that the burdens of taxation shall be imposed equally upon all persons pursuing the same avocation, or that, if those following the same calling are divided into classes for the purpose of taxation, the basis of classification shall be reasonable and founded on a real distinction and not merely arbitrary or capricious. To this extent also, and no further, the principle applies to license fees or taxes imposed under the police power for the better regulation of occupations supposed to have an important public aspect."

While a general statement from a text book based upon the decisions of the State courts with reference to the meaning of the limitations upon the taxing power found in the State constitutions can have but little value in considering the effect of the limitation upon the taxing power contained in the Alaska Organic Act, because these limitations as found in the State constitutions are in all cases, as has been pointed out in the opening brief, widely different from the limitation found in the Alaska Organic Act, it will be

noted that the quotation from Cyc. referred to in the brief of counsel for the Territory and above quoted states in express terms that these limitations are applicable to license taxes, and cannot, therefore, be relied upon as any authority for the statement of counsel that they are not so applicable.

Counsel also refers to the case of *Binns vs. The United States*, but in that case none of the questions here involved were before the Court. The only question there was whether Congress could collect a tax in the Territory that was not uniform throughout the United States, and it was held by the Court that because that tax was a local tax levied for the purpose of meeting the expense incident to the administration of the law in the Territory it did not come within the inhibition "That all duties, imposts and excises shall be uniform throughout the United States." None of the questions presented in this case were before the Court in that case. If the decision in that case has any bearing upon the issues in this case whatsoever it is upon the point that these license taxes are taxes within the meaning of that term when used in the Constitution. Say the Court upon that point:

"We shall assume that the purpose of the license fees required by Section 460 is the collection of revenue and that the license fees are excises within the constitutional sense of the term. Notwithstanding we are of the opinion that they are to be regarded as local taxes imposed for the purpose of raising funds to support the administration of the local government in Alaska."



5. *Relating to the Argument of Counsel that License Taxes are Expressly Provided for in the Organic Act.*

The Organic Act contains the provision "That this provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses."

The language quoted is part of a provision limiting the power of the Legislature in relation to the modification and repeal of certain laws in force at the time the Organic Act was passed. Its effect was fully discussed in our opening brief. It was there pointed out, first, that the provision quoted was not a grant of powers at all, and second, that even if viewed as an express grant of powers, it did not confer the right to impose a license tax, in that the power to license conferred authority only to exact a license in connection with regulations imposed under the police power, and the authorities bearing upon that question were cited and discussed.

In addition to what was there said, attention is directed to the following provision contained in Section 9 of the Organic Act:

"No tax shall be levied for territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year; nor shall any incorporated town or municipality levy any tax for any purpose in excess of two per centum of the assessed valuation of property within the town in any one year."

It will be noted that the extent to which the taxing power can be exercised by either the Territorial Legislature or the municipalities is clearly defined and limited by the Organic Act. While these provisions are limited to the taxation of property within the territory in the one case, and the taxation of property within the municipality in the other case, this reference to property was made necessary to indicate that the power of the Legislature to levy taxes extended to all property within the Territory, while that of the municipality extended to such property only as was situated within the municipality. The object of the provision is clearly to limit the power of taxation; not the power of levying taxes on property only, but taxes. Its purpose is to prevent over-taxation. Clearly, Congress would not so jealously guard property against over-taxation and leave industry without any protection whatsoever.

If counsel's contention in this regard is correct, Congress expressly protected idle property against over-taxation while it expressly provided that those engaged in producing wealth might be taxed in whatever sum the Legislature might feel inclined to exact. Independent of all other considerations, therefore, this provision in the Organic Act clearly indicates that it was the intention of Congress that the taxing power of the Territorial Legislature should be limited to a tax of one per cent. on the assessed valuation of property in the Territory, while that of the municipality should

be limited to a tax of two per cent. on the assessed valuation of property in the municipality, and that no other or further taxes should be assessed.

If there were any doubt that it was the intention of Congress to leave the limitation upon the power of the Legislature, in relation to the amendments and repeal of the existing laws referred to in the proviso, in such condition that the Legislature should not be hampered in providing further regulations, and that the object in inserting the proviso referred to was to secure to the Legislature the right to further regulate under the *police power*, this doubt would be set at rest by a reference to the debate in Congress upon the subject. The proceedings had before Congress at the time are fully set out in the opinion of the Trial Court in the case of the Alaska Pacific Fisheries against the Territory, number 2709, and are as follows:

“The bill came up for argument on Wednesday, the 24th day of April, 1912. In its original form the proviso was as follows:

‘That the authority herein granted to the Legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal or other general laws of the United States’; and nothing was there said about the game or the fish. Whereupon the following occurred:

Mr. WILLIS—Mr. Chairman, I offer the following amendment, which I send to the desk and ask to have read.

The Clerk read as follows:

Line 9, page 23, after the word "States," insert the words "or to the game laws of the United States applicable to Alaska."

Mr. MANN—Why not make it game and fish laws?

Mr. WICKERSHAM—Mr. Chairman, I think the fish laws ought to be left alone.

Mr. MANN—Why not make it game and fish laws, so that they cannot repeal the fish laws? They can pass new fish laws.

Mr. WILLIS—Mr. Chairman, I will accept that amendment, and ask unanimous consent that it be so modified and reported as modified.

The CHAIRMAN—Without objection, the amendment will be so modified, and the clerk will report the amendment as so modified.

The Clerk read as follows:

Line 9, page 23, after the word "States" insert the words "or to the game and fish laws of the United States applicable to Alaska."

Mr. WICKERSHAM—Mr. Chairman, I do not think that the word "fish" ought to be in there. I think the fisheries in Alaska need protection. They belong to the people of the State or to the Territory, and they do not belong to the Government of the United States. They are not now being protected. They are not now being conserved, and if this Legis-

lature will do something toward conserving and protecting the fish it ought to be allowed to do it. This simply bars the Legislature from protecting the fisheries in that Territory, and it ought not to be in the bill. (8)

Mr. MANN—The gentleman will notice this provision does not apply to passing laws, but only to the repealing of laws.

Mr. WILLIS—It seems to me the observation of the gentleman from Illinois answers the objection of the gentleman from Alaska. It simply provides, if it shall be adopted, that the Legislature of the Territory of Alaska shall not have the power to alter, amend or repeal the United States fish or game laws now in force in the Territory. It does not take away from the Legislature the power to pass additional laws of that character. It seems to me that meets the objection.

Mr. WICKERSHAM—I think they ought to be allowed to amend them.

Mr. WILLIS—We have a Federal fish law in Alaska. The gentleman is not objecting to that.

Mr. WICKERSHAM—No.

Mr. WILLIS—That is all this amendment provides—that the Legislature shall not have the power to amend the present fish or game laws.

Mr. WICKERSHAM—What does that mean?

Mr. WILLIS—It means that the present law shall stand.



Mr. FLOOD of Virginia—Suppose Congress passes a law revising and extending the fish laws there?

Mr. WILLIS—Well, undoubtedly that will be paramount law of Alaska.

Mr. FLOOD of Virginia—What will be the effect of the gentleman's amendment?

Mr. WILLIS—The effect of this amendment will be, as I understand it, simply to take away from the Legislature of Alaska the power to amend the fish or game laws now in effect in Alaska.

Mr. FLOOD of Virginia—It would not have the effect to take away from the Legislature of Alaska the power to amend the fish laws we hereafter pass.

Mr. WILLIS—No; I do not think it would, as I have worded it, although I did not have that in mind when I drafted the amendment.

Mr. MANN—They would not have that power.

Mr. WILLIS—They would not have that power now.

Mr. FLOOD of Virginia—The gentleman is aware of the fact that there is a proposition to revise the fish laws?

Mr. WILLIS—Yes; I think the bill is a good one and ought to pass.

Mr. FLOOD of Virginia—And will in all probability become the law.

Mr. WILLIS—It seems to me this meets the objection that has been raised in a perfectly fair manner, and I think it is a fair objection, but I do not

believe the Legislature ought to repeal the present game or fish laws.

Mr. MANN—We have endeavored to provide in a way for the conservation of the fisheries and game up there. We ought not to permit those laws to be repealed, but if they want to make them more stringent, and probably do, they ought to have that right.

Mr. FLOOD of Virginia—I do not think the amendment means anything, but if it will please anybody to put it in, why, let it go.

Mr. WICKERSHAM—I shall withdraw my objection.

The question was taken, and the amendment was agreed to.

(Vol. 48, Part 6, page 5288, Congressional Record, 62nd Congress, Second Session.)

This, however, did not seem to be specific enough for the Senate, for when the bill reached that body it was amended by having added to this provision: (9)

“Provided further, that this provision shall not operate to prevent the Legislature from imposing other and additional taxes and licenses.”

The House refused to agreed to this and to several other amendments, and the committee on Conference of the House reported, recommending that the House recede from its disagreement to this Senate amendment. The House did recede from said disagreement, and the Senate proviso was added to the bill.

It will be seen from the foregoing that some of the members of Congress were afraid that the amendment first offered might have the effect of preventing further legislation that had for its object the protection of the fish. And the whole debate in relation to the insertion of these amendments concerns this one question. Clearly in inserting the proviso, Congress had no object in view except to make it clear that the limitation imposed upon the power of the Legislature in connection with the amendment and repeal of the laws mentioned should not receive too broad a construction. It was the intention of Congress to provide that these laws should not be amended or repealed, but that the Legislature might notwithstanding this provision have the power to levy further taxes and to provide for further regulation by means of licenses. *Of course, in the laying of these further taxes the Legislature was bound by the limitations contained in the Organic Act*, and so also in the making of the further regulations. In other words, it is provided by Congress that the Legislature should not alter, appeal or amend the laws referred to, but that it should not be prevented from further legislating upon the subject to which these laws related.

But, as has already been indicated in the opening brief, the power to license does not carry with it the power to tax, but merely the power to require a license in connection with the regulations imposed under the police power. A license tax, if it can be

required and exacted at all, must be exacted under the taxing power, and this power is by the Organic Act made subject to certain fixed limitations.

In justification of the law enacted by the Territorial Legislature counsel says that the population of Alaska is largely centered in the neighborhood of towns, and that ninety-nine per cent. of the taxable property of the Territory, excluding fishing and mining, is within the incorporated towns, and that the Legislature, with the express view of exempting property in the incorporated towns from taxation for territorial purposes, laid this license tax on mining and fishing. The excuse counsel offers for this is that the municipalities were already taxed for municipal purposes, and that it would cost more money to collect a property tax than a license tax.

In discussing the effect of this law in the opening brief it was assumed that the Legislature acted fairly, and that it was not the purpose of the Legislature to collect taxes from the mining and fishing industries alone, but that this result followed accidentally. Now comes counsel and advises the Court that it was the result of premeditation, that the mining and fishing industries were selected to pay the expense of the Territorial Government in order that other property might not be called upon to bear any part of the burden. The excuse that municipalities were already taxed is a very lame one. Municipalities throughout the United States are taxed for municipal purposes, yet every-

where property within these municipalities bears its just proportion of the expenses incident to the administration of the State governments, and counsel forgets that the mines and fisheries were already taxed before the enactment of this law, under the Act of Congress. He also forgets that the moneys collected under the Act of Congress as license taxes from those residing within the incorporated towns is turned over by the Federal Government to the municipalities to be expended for municipal purposes, so that those residing within the municipalities and paying the license taxes receive the benefit of the taxes so paid, while the taxes paid by the mines and the fisheries situate outside of the incorporated towns are, in the main at least, turned into the general Alaska fund. Again he forgets that some of the fisheries, at least, are situate within the incorporated towns. Petersburg, Fort Wrangel and Ketchikan have within their boundaries at least one or more salmon canneries, while Juneau and Sitka have within their boundaries cold storage fish plants, and this may be true, so far as is known, of other municipalities.

If the statement of counsel is correct that the mines and fisheries were taxed for the express purpose of relieving property within the towns of taxation, it is reasonable to assume that the exemption of five thousand dollars in the case of mines was made for the express purpose of relieving the placer mines from taxation, throwing the entire burden on the quartz mines



and the fisheries. For this is the effect of the Act, as was pointed out in the opening brief.

Nor is the point made by counsel, that the expense of levying a property tax would be greater than that of levying a license tax, a valid one. Under the conditions mentioned, that ninety-nine per cent. of the property is situated within the incorporated towns, where it has already been assessed, it would not be a difficult matter to assess this property in connection with the levying of a tax for territorial purposes. It might be more expensive the first year than the collection of a license tax, but this additional expense would be slight and would not be any excuse for the imposition of an unjust and unequal tax laid upon the mines and fisheries alone.

The statement of counsel that the salmon industry produced somewhere in the neighborhood of twenty million dollars is more or less misleading. While the selling price of the product might have been this much in a single year, this product is composed not only of the fish, but it contained the tin, lumber, labor, and all kinds of material that composed the finished product, and the fish canned form a comparatively small item in calculating the total cost of the product. According to the statement of counsel it was not the purpose of the Territorial Legislature to tax the fishing industry at all, but the object of the tax was to sell the fish. By what authority the Legislature acted in

the selling to the fisheries the fish found in the waters of Alaska is not stated.

Counsel says that the revenue bill forming the basis of this action was loosely and inartistically drawn, and that there would have been great difficulty in enforcing it had the Territory actively attempted to do so. It is then stated by counsel that according to the reports of the Territorial Treasurer of Alaska there was paid under the Revenue Laws of 1913 \$54,641.03, and while there is nothing in the record concerning this matter it is but fair to add that the fifty-four thousand and odd dollars referred to were not collected under the law before the Court in this case. All that was collected under that law according to the printed report of the Treasurer, referred to by counsel, was \$3,545.36. The balance was collected, according to this report, in part under a poll tax law since held void by this Court, and in part under a law requiring corporations doing business in the Territory to pay a fee in connection with the filing of articles of incorporation, annual reports, etc.

That the fisheries and the mines should pay their just proportion of the expense incident to the administration of government in Alaska cannot be denied, but it is unfair and unjust to cast the entire burden upon these industries. An ad valorem property tax would distribute the burden of taxation equally, and

would in all respects comply with the requirements of the Organic Act and the Federal Constitution.

Respectfully submitted.

HELLENTHAL & HELLENTHAL,  
Attorneys for Plaintiff in Error.

CURTIS H. LINDLEY,  
Of Counsel.

~~CONFIDENTIAL~~

No. 2727.

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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ALASKA MEXICAN GOLD MINING COMPANY,  
a Corporation,  
vs.  
TERRITORY OF ALASKA,  
Plaintiff in Error,  
Defendant in Error.

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**PETITION FOR REHEARING.**

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CURTIS H. LINDLEY,  
HELLENTHAL & HELLENTHAL,  
Attorneys for Plaintiff in Error.

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**Filed**

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THE JAMES H. BARRY CO.  
F. D. M...





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ALASKA MEXICAN GOLD MI-	}	No. 2727.
NING COMPANY, a corporation,		
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<i>Defendant in Error.</i>		

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**PETITION FOR REHEARING.**

Comes now the plaintiff in error and respectfully petitions the Court for a rehearing herein, upon the grounds and for the reasons hereinafter enumerated:

**I.**

It was contended upon the hearing that the Act of the Territorial Legislature, which forms the basis of this action, created no civil liability and could not therefore form the basis of a civil proceeding. The Court held, however, that under the Act there was a duty to pay the amount of the license tax imposed and that for this reason a civil proceeding might be brought to enforce the payment of the amount which

it was the appellant's duty to pay, a subsequent act of the Legislature having provided a civil remedy for the recovery of all taxes due and owing. If the provisions of the Act were such that a license would issue as a matter of course upon the payment of the money demanded as a license tax, the situation would be as pointed out by the Court.

We desire, however, to direct the attention of the Court to the peculiar provisions of the Act. The Act provides that it shall be an offense to carry on the business of mining without first applying for and obtaining a license, as in the Act provided. It is then provided that the applicant shall make an application to the Court or Judge, which shall be filed with the Clerk and by him presented to the Court or Judge, together with such recommendations for and remonstrances against the granting of the license as shall have been filed. The Court then acts upon this application and either grants or refuses the license and the Clerk can only issue the license after the Court has made an order permitting it to be issued.

The license, therefore, required under this Act is not a mere receipt for taxes paid as is the case where the license issues as a matter of course upon the payment of the money, but it serves to confer a privilege upon the licensee which may be either granted or withheld, depending upon the action of the Court. The license does not differ in principle from the license required from liquor dealers under the Fed-

eral License Laws in force in the Territory. The applicant must apply to the Court and present his recommendations and others may file remonstrances, and the Court must act thereon.

In the case of liquor licenses, the procedure is very similar. It is true that certain additional restrictions are imposed in connection with the issuance of liquor licenses, but this does not alter the fact that in either case the license may be granted or withheld.

This brings the case within the language employed by Judge Gilbert in rendering the decision of this Court in the case of *United States vs. Jorden*, 193 Fed., 986. In that case Judge Gilbert says:

"The case at bar is unlike that of *United States vs. Chamberlain*, 219 U. S., 250, in which it was held that an action would lie by the United States to recover the amount of a stamp tax payable under the War Revenue Act of June 13, 1898, upon the execution of a conveyance. The present action is not one to recover a tax imposed upon the performance of an act which all persons are permitted to perform, and which in itself is not in any way regulated or restrained, but it is an attempt to recover fee which the law prescribed as one of the conditions upon which might be obtained the permission to engage in a specified business which is declared by law to be unlawful without that license."

Judge Gilbert here states the situation exactly. The offense of the appellant under the Alaska Act does not consist in a mere failure to pay the license tax imposed, but it consists in its failure to obtain the

permission of the Court or Judge to carry on its business. Without this permission it could not obtain a license.

## II.

It was further contended upon the presentation of the cause to this Court, that the Act was void for the reason that it was impossible to comply with it. The Act makes it an offense to prosecute or attempt to prosecute the various lines of business referred to without first applying for and obtaining a license so to do from the District Court or subdivision thereof in the Territory, and paying for the license the amount indicated.

Section 2 of the Act again provides not only that the license must be applied for and obtained, but also paid in advance. The language of Section 2 bearing upon this question is as follows:

“That any person, corporation or company doing, or attempting to do business in violation of the provisions of this Act, or without first having paid the license therein required, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined, etc.”

It must, of course, be conceded that one engaged in mining could not pay a license tax of one-half of 1% on his income for the succeeding year, in advance, since the amount of his income could in no way be determined. But the Court held that he might comply with the law by filing an application for a license

and receiving a license upon the filing of such application and paying therefor at the end of the season when the amount of his net income could be determined.

If the language of the Act were such as to admit of this procedure and method of payment, if there were anything in the Act that would permit the Clerk to issue a license before the amount had been paid, and the applicant to carry on his business without payment until the end of the year, the conclusion reached by the Court would, of course, be a correct one.

But it appears to us that the mandates of the Act are clear and explicit and that the language employed is such as to leave no room for construction.

The Act first provides that any person, etc., prosecuting or attempting to prosecute any of the lines of business enumerated "shall first apply for and obtain a license so to do."

Section 2 provides that the license shall be issued by the Clerk and that the Clerk of the Court in each division shall give a bond in such amount as the Treasurer of the Territory may require, conditioned that he will pay out the moneys collected by him in the manner provided for in the Act.

Section 3 provides:

"That any person, corporation or company doing, at attempting to do, business in violation of the provisions of this Act, or without first having



paid the license therein required, shall be deemed guilty of a misdemeanor."

In this connection we desire to call the Court's attention to two points: First, no authority is vested in the Clerk to issue a license without the payment of the license tax, nor is any authority vested in the Court or Judge to order the issuance of such a license without the payment of such tax, nor could a Clerk be expected to issue such license unless the tax were first paid, for if he should do so and the tax was not paid at the close of the season, he would undoubtedly be personally liable for the amount. A license could not, therefore, be obtained from the Clerk without the payment of the tax.

Second, the Act not only provides that a license must be obtained, but also that the tax must be paid, and unless both of these conditions are complied with under the express and explicit terms of the Act, the person so failing to comply therewith becomes guilty of a misdemeanor and subject to the numerous penalties imposed.

There is no provision under which the person engaging in business without first paying for the license could protect himself against prosecutions under the Act. The law does not authorize any one to issue the license unless it is paid for, and even if a license were issued without its being paid for, the licensee would not be protected, because the Act clearly de-

clares him guilty of a violation unless he also pays the amount required.

We, of course, fully agree with the Court that all Legislative Acts should receive a reasonable construction with a view of carrying out, if possible, the intent of the Legislature. But it appears to us that the adoption of the method of procedure and payment pointed out by the Court would be more than placing a construction upon the language of the Act, that it would be adding something to the Act that is not there, and that this something so added would be repugnant to the spirit as well as the express provisions of the Act.

In this connection it must be further borne in mind that the Act is not only penal in its nature, but also is an Act relating to the collection of taxes. Penal acts are all strictly construed and this is likewise true of acts relating to the collection of taxes. But whether a strict rule of construction or a liberal rule were adopted, we would, of course, not be authorized to eradicate from the statute things clearly expressed therein and substitute something else in the place thereof, and it appears to us that it is necessary to do this in order to follow out the method of procedure and payment indicated by the Court.

If our position in this regard is the correct one, it follows, of course, that the Act cannot be complied

with and is therefore void. As is said by Sir William Blackstone, Volume I, page 91:

“Acts of Parliament that are impossible to be performed are of no validity.”

### III.

The Act of the Territorial Legislature requires the applicant to file an application for a license, which application, together with the recommendations for the granting of the license and remonstrances against the granting of it, are submitted to the Court or Judge, who is directed to act therein and either grant or refuse the license, and the Clerk is directed to act upon the order of the Court in issuing a license.

It was contended upon the hearing that since this Act empowered the Court or Judge in passing upon these recommendations and remonstrances to refuse an applicant a license to conduct a business lawful in itself, such as mining, the Act was void. In support of this contention we referred the Court to the case of *Yick Wo vs. Hopkins*, 118 U. S., 356. In that case an Ordinance of the City of San Francisco empowering the Board of Supervisors to grant or withhold a permit or license to run a laundry in a wooden building, was held void. It was contended that the case above cited was on all fours with the case at bar, in that in one case the Board of Supervisors had the arbitrary power to deprive a person from operating a laundry, which was held to be a

lawful business, and in the other case the Court or Judge is endowed with the arbitrary power to prevent a person from operating a mine, a business equally lawful as that of operating a laundry.

The Court held, however, that in view of the fact that the appellant had made no application to the Court for a license, it was not in position to urge the invalidity of the Act, because of the fact that it conferred upon the Court this unusual power. It is, of course, true that not having made an application the appellant is not in a position to complain of any action taken by the trial Court in granting or refusing a license, but if the Legislature could not confer upon the Court or Judge this arbitrary power of granting or refusing a license to one seeking to engage in a business lawful in itself, and a license cannot be obtained as is the case under the Act of the Territorial Legislature, without submitting to the exercise of this arbitrary power, the whole act by which a license is required to be obtained in this manner, it seems to us, cannot be other than entirely void, and if so, it could be disregarded. Our objection is not to any action taken by the Court but to action taken by the Legislature.

To illustrate, every one operating a laundry in San Francisco at the time the invalid ordinance referred to by the Supreme Court in the case cited was in force, would not be required to ask the Board of Supervisors for a permit or license to operate a laun-

dry. Such a one would have a right to ignore the ordinance entirely. So also in the case under discussion. The Legislature had no power to confer on a Court or Judge the authority to either grant or withhold permission to conduct a lawful business, and since it had not that power, any act attempting to confer such authority would be void, and being void, we think no one would be obliged to make any attempt to comply with it.

#### IV.

We next urge the point that the law under discussion violated the 14th amendment, in that it exacted from the plaintiff in error a tax not exacted from others similarly situated. This point was not passed upon by the Court in rendering the decision.

It was urged that since the law requires those engaged in mining to pay one-half of 1% on their net incomes, the tax required was an income tax and that since no income tax is required from those engaged in any other pursuits, the Act discriminated against persons engaged in mining in favor of those engaged in other pursuits. It was urged that mining as a business did not differ in any respect from any other equally lawful and legitimate business and that persons engaged in mining were therefore similarly situated with those engaged in other pursuits and that being similarly situated with such others it would be an unlawful discrimination to impose upon those en-



gaged in mining a tax that is not imposed upon any of the others. The case upon this point we think is controlled by the case from Hawaii, cited and discussed in the brief and decided by this Court.

## V.

It was next contended that the tax sought to be exacted was an income tax and laid in violation of the provisions of the Organic Act which provides that:

“All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws and the assessments shall be according to the actual value thereof.”

This contention so made was not passed upon by the Court in rendering the decision. It was contended in this connection that the tax was not uniform upon the same class of subjects, in view of the fact that it was assessed only against those engaged in mining. And furthermore, that the Organic Act would not permit the Legislature to place each individual operator in a class by himself as it did in this case.

Under constitutional provisions of this character it is not necessary that taxes levied should be uniform and equal upon all persons whatsoever, but they must be uniform upon the same class of subjects, that is to say, those subject to taxation must be classified, or in other words they must be grouped and each class or group must be similarly taxed. Here no attempt at

classification is made. Each individual operator is required to pay a different tax, depending upon his income.

It was further contended that the income tax so levied also violated the further provision of the Organic Act that all taxes must be assessed according to value.

This whole question was discussed by us in the brief on pages 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67 and 68, and we will at this time only direct the Court's attention to two cases that are on all fours with the case at bar.

In the case of *Banger's Appeal*, 109 Pa. St., 79, one of the identical questions now before this Court was before the Supreme Court of Pennsylvania. The Constitution of Pennsylvania contained a provision that all taxes should be uniform upon the same class of subjects, but it contained no provisions requiring assessments to be according to value. In that case the City of Williamsport, by an ordinance, sought to collect a tax in all respects like the tax sought to be collected here. The tax was called a license tax and the amount which each person was to pay was in each case determined by the income of the person taxed.

The Court held in the first place that notwithstanding the fact that it was called an occupation tax, the tax was in fact an income tax, and that regardless of its character it was not uniform upon the same class of subjects and was therefore void in

that it failed to comply with the constitutional requirement in that regard.

The Court discussed at some length the manner in which occupation taxes could be levied so as to comply with the constitutional requirement of uniformity and pointed out clearly why the tax in question did not answer this requirement, and in referring to the opinion expressed by the lower Court where it was held that the tax complied with the uniformity requirement, the Supreme Court say:

"These views of the learned Court are well enough as far as they go, but they do not come to the proper standard of uniformity. However they might have been regarded prior to the adoption of the present constitution, they do not conform to the requirements of the Organic Law as it exists at the present time. That requires not merely that there shall be no exemption of persons or classes, but that upon persons and classes the tax shall be uniform. Thus in levying a tax upon 'occupation' a tax of \$100 upon every person having a known occupation would be uniform, but what uniformity is there in laying an occupation tax of \$100 upon A and a like levy of \$200 upon B, the occupation of each being similar?"

And again in the course of the opinion it is said:

"It may be asked how an occupation is to be assessed and how is the constitutional mandate to be complied with? The answer is not difficult. A tax of \$100 upon all occupations would be uniform. We are at once confronted with the objection that it would be unjust to tax the occupation of a laborer the same amount as a merchant,

a physician or a lawyer. The injustice of such an exercise of the taxing power may be conceded without in any degree impairing the force of the argument. The objection is one that appeals more to the Legislative than to the Judicial department of the Government. The proper result may possibly be reached by classification. Thus it may be that physicians, lawyers, clergymen, merchants, bankers, manufacturers, mechanics, etc., etc., may be classified and a uniform occupation tax assessed upon each class, but it will not do to tax one member of a class \$100 and another member of the same class \$1000 upon a supposition or even upon the fact that one earns more than the other. An occupation tax is peculiar in its character. It is not a tax upon property, but upon the pursuit which a man follows in order to acquire property and support his family. It is a tax upon income in the sense only that every other tax is a tax upon income. That is to say, it reduces a man's clear income by the precise amount of the tax, but it is an income tax in no sense."

And with reference to the other point that the tax, although denominated an occupation tax was in fact an income tax, the Court say:

"This brings us at once to a vice underlying the whole case. Under the guise of an occupation tax the City of Williamsport has levied and is seeking to collect an income tax."

Another case on all fours is the case of *State vs. Cook*, 36 Atl., 892. The Constitution of the State of New Jersey provided, as does the Alaska Organic Act, that all property should be assessed for taxes at its true value. The Legislature of New Jersey laid

a tax on mines assessed according to their income. This is exactly what the Alaska Territorial Legislature did. The Supreme Court of New Jersey held that if mines were taxed their actual value must form the basis for taxation, regardless of the income, in order to comply with the constitutional provision that property must be assessed according to value. In passing upon that point the Supreme Court of New Jersey say:

"That income is a criterion for valuation is peculiarly inapplicable to the taxation of mining property, in relation to which each year's income represents to that extent a diminution in the actual intrinsic value of the property."

A number of other cases are also cited and discussed in the brief. Many cases were referred to in relation to the point that the fact that the tax was called a license tax does not make it such, but that being levied on the income, resulting from the mining operations, it was in fact an income tax and not a license tax. And it was further pointed out upon the authority of the income tax case that an income tax upon mining was a tax on the mines from which the income was derived.

Whatever, therefore, might be the power of the Legislature to exact a license tax, and whatever may be the law upon the further question of whether license taxes must comply with the constitutional requirements of uniformity, and assessment according to



value, this tax was not a license tax. Upon this point the decisions referred to in the brief, including those by the Supreme Court of the United States, are entirely harmonious, and not being a license tax it would in any event be required to be uniform and assessed according to value. This matter, together with the authorities bearing thereon, was quite fully discussed in the brief and for that reason will not be further inquired into in this petition for a rehearing, but since the point was not referred to in the decision we especially direct the Court's attention to it.

## VI.

We now come to the principal point upon which we petition the Court for a rehearing herein. The Organic Act contains among others the following limitations upon the taxing power:

"All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws and the assessments shall be according to the actual value thereof."

It was pointed out in the brief that the tax sought to be imposed by the Territorial Legislature which forms the subject of this action, was not uniform upon the same class of subjects and was not assessed according to value, and therefore violated these provisions of the Organic Act.

The Constitutional provisions in all the States where provisions similar to those contained in the Alaska

Organic Act obtained, were quoted, and the decisions under each of these provisions discussed. It was pointed out that many of these Constitutional provisions, unlike the provisions of the Organic Act for Alaska, expressly limited the application of the doctrines of uniformity and assessment according to value, to property taxes, so that these provisions did not, when so limited, apply to license taxes which are generally regarded as taxes not upon property but upon occupations. It was further pointed out that in some cases express constitutional authority was conferred to collect license taxes, that is to say, license taxes were authorized by express mention, and that because of this the various provisions of the Constitution could not be given effect as a whole unless it was held that license taxes did not come within the provision requiring assessment according to value, because these taxes could not be so assessed. Hence a decision to the effect that they must be assessed according to value would entirely avoid the grant by express mention in the Constitution of the power to lay such tax.

It was further pointed out that this state of facts led to a line of decisions in which it was held that license taxes need not be assessed according to value. In these States, however, the decisions are to the effect that license taxes must be uniform upon the same class of subjects for the reason that this is a provision with which they could comply, so that this requirement

could be imposed upon license taxes without avoiding the express grant to levy such taxes. It was further pointed out that in all the States where no grant by express mention to levy license taxes existed, and where the Constitutional provisions requiring uniformity and assessment according to value, were not limited in express terms to property taxes, the Courts uniformly held that license taxes could not be imposed unless they complied with the limitations of the Constitution imposed upon the taxing power. If these limitations required uniformity, license taxes were required to be uniform, and if they required assessment according to value, license taxes were required to be assessed according to value, and if not so assessed they were not sustained.

But the Court in this case expressed the opinion that the Organic Act contained an express grant to impose a license tax, or what was equivalent to an express grant to impose such a tax.

In passing upon this particular point, the Court in their opinion use this language:

"We take it to be undisputable that the creation of revenue by the imposition of license taxes upon carrying on of business is in a general sense a rightful subject of legislation, but in this matter inquiry into the general question is unnecessary, for as already pointed out we have express transfer of authority to the Territorial Legislature to impose license taxes. The power, therefore, being in the Legislature, such taxes may be imposed

without the restrictive limitations which must control in levying taxes upon property in its usual sense."

We think the Court received the wrong impression from the language employed in the Organic Act. This language, while it recognizes the right by express mention to impose licenses, does not authorize the Territorial Legislature by express mention to impose license taxes.

The provision referred to reads as follows:

"provided that this provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses."

This provision was a mere proviso inserted with a view of preventing misconstruction, but as this Court said, and we think correctly, it recognized the existence in the Territorial Legislature, of the right to impose taxes or licenses. Independent of such recognition by the Organic Act, however, we agree with the Court that the general clause extending the powers of legislation to all rightful subjects of legislation, include the power to levy taxes of any character, provided, however, that these taxes comply with the requirements of uniformity and assessment according to value, elsewhere expressly provided for in the Organic Act itself.

We also think that under the clause permitting the Legislature to deal with all rightful subjects of legislation, it had power to exact licenses in the exercise

of the police power for the purpose of regulation, and that these licenses, so long as their object was not revenue, but were merely imposed for regulation under the police power, were not subject to the limitations imposed upon the exercise of the taxing power.

But we do not think that the recognition of the right to impose other and additional taxes or licenses expressly recognizes the right to impose license taxes. Taxes are one thing and licenses are quite another thing. Taxes are exactions made by the Government for the purpose of raising revenue, and licenses are permits issued to licensees to do those things which would, without such permission, be unlawful. Their object is not the production of revenue, as is the case with taxes, but their object is regulation under the police power.

A license tax is a tax imposed in the exercise of the taxing power and its object is to raise revenue. It does not differ from a property tax in character, except that the subject of taxation is not property, but this or that occupation, and while the right to impose taxes would include the right to impose license taxes, a grant of a right to tax is not an express grant of a right to impose a license tax, that is to say, a grant by express mention, so that the limitations contained in the Organic Act upon the taxing power, where those limitations are as in the case of the Alaska Organic Act, made applicable to all taxes, would have to be held inapplicable in order to give the entire



Organic Act effect. Nor is the recognition of the right to require licenses in any sense a recognition of the right to require or impose license taxes. A license is one thing and a license tax is quite a different thing. The former is exacted under police power and the latter under taxing power. The object of one is regulation while that of the other is revenue. They bear no relation to one another and a grant of power to exact or impose one does not include the right or power to impose the other.

The authorities are uniform upon the subject that a grant of power to exact a license does not authorize the imposition of a license tax.

As is said by Judge Cooley on page 1138 of *Cooley on Taxation*:

“The terms in which a municipality is empowered to grant licenses, will be expected to indicate with sufficient precision whether the grant is conferred for the purpose of revenue or whether on the other hand it is given for regulation merely. It is perhaps impossible to lay down any rule for the construction of such grants that shall be general and at the same time safe, but all delegated powers to tax are to be closely scanned and strictly construed. It would seem that when a power to license is given, the intendment must be that regulation is the object, unless there is something in the language of the grant or in the circumstances under which it is made indicating with sufficient certainty that the raising of revenue by means thereof was contemplated.”

So also in the case of *Sunset Telephone Company vs. Medford*, 115 Fed., 202, it was said:

“This is a revenue provision, and is not within the authority conferred upon the city by its charter. ‘The power to license, as a means of regulating a business, implies the power to charge a fee therefor sufficient to defray the expense of issuing the license, and to compensate the city for an expense incurred in maintaining such regulation. *Whenever it is manifest that the fee for the license is substantially in excess of what it should be, it will be considered a tax, and the ordinance imposing it void.*’ ”

In the case of *Clark vs. Brunswick*, 43 N. J. L., 175, the Court, speaking with reference to a grant of power to impose a license, say:

“Under such grant of power it has been repeatedly held in this State the right to taxation for revenue purposes is not conferred.

“It is purely a police power and must be exercised for the purpose of regulation.”

and again it is said:

“When authority is given to require the possession of a license as a condition for selling, a reasonable fee, to cover probable expense can be demanded, but the exaction of sums in excess of such expenses and graduated by the amount of business done can be nothing else but a tax upon such business.”

So also in the case of *Cache County vs. Jensen*, 61 Pac., 309, the Supreme Court of Utah say:

“So a right to license a business or occupation does not imply a right to exact a tax merely for revenue and where the object is revenue, the power to license for that purpose must be conferred in unequivocal terms. ‘License’ in general implies privilege and regulation and imposition of it falls within the police power of the State.”

Again, when the whole Organic Act is considered, and every part of it is read in connection with other parts bearing upon the same subject, it becomes very apparent that it was not the intention of Congress to confer upon the Legislature of Alaska power to impose a license tax without regard to the limitations imposed upon the taxing power. Every power conferred is hedged about by limitations and this is especially true of the taxing power. Not only is it provided that all taxes shall be uniform and assessed according to value, but a further provision occurs which provides as follows:

“No tax shall be levied for territorial purposes in excess of 1% upon the assessed valuation of property therein in any one year, nor shall any incorporated town or municipality levy any tax, for any purpose, in excess of 2% of the assessed valuation of property within the town in any one year.”

And Section 9, which contains the limitations upon the taxing power, also contains this provision:

“And all laws passed or attempted to be passed by such Legislature in said Territory, inconsistent with the provisions of this section, shall be null and void.”

Here then is an express declaration by Congress that all laws passed that are in conflict with this particular section, irrespective of the remaining portions of the Organic Act, shall be null and void.

Now, what does this section provide? It provides firstly, that all taxes must be uniform upon the same class of subjects, and secondly, that all taxes must be assessed according to value.

Now a license tax must conform to the provisions of that section. If it cannot do this, it cannot be imposed at all, for legislation that does not comply with the provisions of this section is void, and because of the express language contained in the section itself, to that effect, this section must be construed by itself, without reference to any other provisions in the Organic Act.

Again, what do all these limitations imposed upon the taxing power indicate? They indicate, if they indicate anything, that it was the purpose and object of Congress to protect the people of Alaska against over-taxation, as well as against unjust and unequal taxation. A provision is inserted that no tax should be levied for territorial purposes in excess of 1%

on the assessed valuation of property therein in any one year. No tax shall be levied for municipal purposes in excess of 2%. Yet if a license tax could be imposed without complying with these provisions, why insert these provisions at all? Surely it was not the object of Congress merely to protect idle property against over-taxation and leave industry without any protection against the same evil. If license taxes can be imposed, notwithstanding these limitations upon the taxing power, each and all of these limitations become meaningless and valueless. The only taxes levied in the territory are license taxes, and as pointed out in our brief, these taxes are so levied that they fall almost exclusively upon certain localities. If it had been the intention of Congress that the Legislature should have power to levy license taxes in disregard of the provisions of the 9th Section, it would not only have said so in express and unequivocal language, but it would have pointed out clearly the extent to which these license taxes could be imposed. The whole matter would not have been left open, so that the entire tax of the Territory could be assessed against one or two industries and to the practical exclusion of all others, nor would it have left the matter in such shape that in imposing a tax on those engaged in mining, all those whose net income did not exceed \$5000 would be exempt, the practical effect of which, as we have pointed out in our brief, is that the quartz mines of the Coast are obliged to bear



nearly all, if not all, the taxes assessed against the mining industry.

This is unfair and unjust and is it reasonable to presume that since Congress placed so many limitations upon the power of the Legislature with a view of protecting the people of Alaska against unwise legislation, and placed upon the taxing power limitations that are not found in any other Constitution, it would have protected industry in the Territory against the very vice of which we now complain. It would have provided specifically what industries could be made subject to a license tax and it would have guarded against abuse of the power conferred by throwing about it suitable limitations.

In view of the foregoing we think it clear that the proviso providing that the Legislature may impose other and additional taxes or licenses could not be construed as an express grant or an express recognition of the power to impose license taxes, even if there were no other authority upon the subject. For, as Judge Cooley says in his work on Taxation, 3rd Edition, 1139:

“All delegated powers to tax are to be closely scanned and strictly construed.”

It seems to us to be clear that it was the intention of Congress to protect the people of Alaska against unequal or burdensome taxation, and that this intention cannot be carried into effect if the Organic Act

is so construed as to permit the assessment of license taxes, in whatever manner and to whatever extent the Legislature may see fit.

There is one point to which we did not call the Court's attention upon the hearing, for the reason that it was at that time overlooked by us, and that is found in the provision contained in Section 9, to which we have alluded, which provides:

"and all laws passed or attempted to be passed by such Legislature in said Territory, inconsistent with the provisions of this section, shall be null and void."

The insertion of this provision in Section 9 compels us to construe Section 9 by itself, without reference to the provision contained in Section 3, which provides:

"That this provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses."

Section 9 first contains the grant of power which extends to all rightful subjects of legislation and then modifies this grant by the many limitations contained in that section and the limitations relating to the taxing power are that all taxes shall be uniform and assessed according to value. This provision is so worded that it must be held to apply to each and

every tax, whether a license tax or any other kind of a tax, for no more comprehensive word than the word "all" could be employed by Congress in indicating what taxes these provisions should apply to.

And the further provision that no tax shall be levied for Territorial purposes in excess of 1%, or for municipal purposes in excess of 2% on the assessed valuation of property, is equally clear and explicit. In no way could Congress employ language that could more clearly indicate that taxes other than property taxes to the extent of 1% in one case and 2% in the other, were prohibited. For it is said that no tax other than those mentioned, shall be levied. The words "no tax" are as all exclusive as the words "all taxes" are all inclusive. Then follows the express provision that a law which does not comply with this particular section, Section 9, shall be void.

The degree of certainty employed by Congress in this regard appears to us to be the highest; it is at least certainty to a particular intent and may be regarded as certainty to a particular intent in every particular.

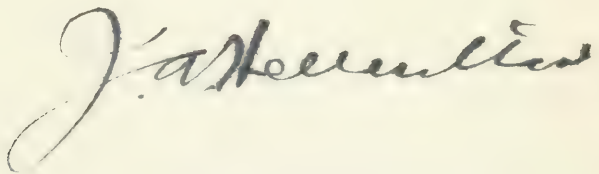
It appears to us that the Court received the wrong impression from the reading of the Organic Act and we have gone into this matter quite fully, because it was not fully presented from its various aspects upon

the hearing, and for the reasons mentioned we respectfully petition this Honorable Court for a rehearing.

Respectfully submitted.

CURTIS H. LINDLEY,  
HELLENTHAL & HELLENTHAL,  
Attorneys for Plaintiff in Error.

J. A. HELLENTHAL hereby certifies that he is counsel for the plaintiff in error, the petitioner herein, and that in his judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

A handwritten signature in dark ink, reading "J. A. Helleenthal". The signature is written in a cursive style with a large, looping initial "J".

1875



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

JUNEAU FERRY AND NAVIGATION COM-  
PANY, a Corporation,

Appellant,

VS.

C. P. MORGAN, R. B. COCHRAN AND H. JO-  
HANSEN, Copartners, Doing Business  
Under the Name and Style of the ISLAND  
FERRY COMPANY,

Appellees.

Transcript of Record.

*Appeal from*  
Upon ~~Writ of Error to~~ the United States District Court of the  
District of Alaska, Division No. 1.

Filed

MAY 12 - 1913



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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JUNEAU FERRY AND NAVIGATION COM-  
PANY, a Corporation,

Appellant,

vs.

C. P. MORGAN, R. B. COCHRAN AND H. JO-  
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Under the Name and Style of the ISLAND  
FERRY COMPANY,

Appellees.

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Transcript of Record.

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Upon Writ of Error to the United States District Court of the  
District of Alaska, Division No. 1.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**[Names and Addresses of Attorneys.]**

J. H. COBB, Juneau, Alaska,

Attorney for Plaintiff in Error.

GEORGE IRVING, Juneau, Alaska,

Attorney for Defendant in Error.

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*In the District Court for the District of Alaska,  
Division No. One.*

No. 1392-A.

C. P. MORGAN and R. B. COCHRAN and H.  
JOHANSEN, Copartners, Doing Business  
Under the Name and Style of the ISLAND  
FERRY COMPANY,

Plaintiffs,

vs.

JUNEAU FERRY AND NAVIGATION COM-  
PANY, a Corporation,

Defendant.

**Complaint.**

Plaintiffs above named, for cause of action against  
the above-named defendant, complain and allege as  
follows:

**I.**

That plaintiffs are copartners engaged in the ferry  
business and in the transportation of freight and  
passengers between the towns of Juneau, Alaska,  
and Douglas, Alaska; and have been so engaged in  
the business aforesaid continuously from the 3d day  
of August, 1915, and are still so engaged.

## II.

That defendant is a corporation organized under the laws of Alaska and engaged in the general ferry business between the towns of Juneau, Alaska and Douglas, Alaska.

## III.

That on the date of November 1, 1915, the common council of the town of Douglas, did make and execute a good and sufficient lease, a copy of which is hereto attached and marked exhibit "A" and made a part of this complaint, to the said plaintiffs, wherein the said town of [1a\*] Douglas did grant and lease to the said plaintiffs, a certain float and premises for a certain rental and for a period of time and upon the payment of a certain sum, all of which is in said lease more particularly set forth in the copy hereto attached and made a part of this complaint.

## IV.

That said plaintiffs, under and by virtue of said lease did take and have quiet, undisturbed and peaceful possession of the said leased property from the 6th day of November, 1915, up to the 13th day of November, 1915.

## V.

That on the 13th day of November, 1915, the said Juneau Ferry and Navigation Company, wholly disregarding the rights of said plaintiffs, under and by virtue of said lease hereinbefore mentioned, and after good and sufficient notice from said plaintiffs, both oral and written, and after good and sufficient

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\*Page-number appearing at foot of page of original certified Record.

notice in writing served upon defendants by the town of Douglas through its legally authorized officers and agents, a copy of which notice is hereto attached and made a part of this complaint and marked exhibit "B," did wrongfully, wilfully and maliciously, and in total disregard of plaintiff's rights therein, enter in and upon said float and premises, by landing their ferry thereat for the purposes of discharging freight and passengers and for the further purpose of loading freight and passengers to the exclusion of plaintiffs and to their damage as hereinafter alleged.

#### VI.

That the said defendant has owned and operated and does now own and operate a ferry or ferries between the towns of Juneau and Douglas, Alaska, for a number of years last past; that they own and control a [2] good and sufficient float and landing at the town of Douglas, Alaska; that said defendant has at all times exclusively used the said float and landing, controlled and owned by it for ferry purposes; that said float and landing is better located and is of superior construction to the float and landing owned, used and controlled by the plaintiffs.

#### VII.

That said landing at, and the trespass in and upon the said float and premises owned and controlled by plaintiffs, by the said defendant, in total disregard of the rights of said plaintiffs, and after due and legal notice as herein set forth to the said defendant, was for the sole purpose of depriving plaintiffs of their rights, and injuring plaintiffs in that on ac-

count of said acts of trespass committed by defendant as herein set forth plaintiffs have been damaged in an amount which is approximately \$15 per day; and that unless defendant is enjoined from continuing said trespass in and upon said float and premises, owned and controlled by plaintiffs, the plaintiffs will be further damaged in a sum upwards of \$35 per day and will be obliged to discontinue their said ferry business; that plaintiffs have no plain, speedy nor adequate remedy at law.

WHEREFORE, plaintiffs pray that the defendant be enjoined from landing at, occupying or trespassing upon said float and premises or in any manner interfering with plaintiffs' exclusive possession of said float and premises, and for such further relief as to the Court shall seem just and equitable in the premises, and that a temporary restraining order be issued herein enjoining and restraining defendants from continuing the acts and things complained of, until further order of the Court.

IRVING and MILLWEE,  
Attorneys for Plaintiffs. [3]

United States of America,  
Territory of Alaska,—ss.

C. P. Morgan, being first duly sworn, deposes and says: That he is one of the plaintiffs named in the foregoing complaint; that he has read said complaint and knows the contents thereof and that all the facts alleged therein are within his personal knowledge; that the said facts are true.

C. P. MORGAN.



Subscribed and sworn to before me this 15th day of November, 1915.

[Notarial Seal]

GEORGE IRVING,  
Notary Public for Alaska.

My Commission expires May 14, 1916. [4]

**[Exhibit "A" to Complaint—Lease.]**

THIS INDENTURE made this 13th day of November, 1915, between the town of Douglas, Alaska, a municipal corporation, hereinafter designated the party of the first part, and C. P. Morgan and R. B. Cochran, a copartnership doing business under the name of the Island Ferry Company, hereinafter designated as parties of the second part.

WITNESSETH, That the said parties of the first part, for and in consideration of the rents, covenants and agreements hereinafter mentioned, to be kept, paid and performed by the said parties of the second part, their executors, administrators and assigns, has demised and leased to the said second parties, the following described premises situated in the town of Douglas, Alaska, and owned and controlled by the said first party, to wit:

“That certain Float and Landing adjoining the City Dock on the north side of the same, together with all piling and structures incident and appurtenant to the same and necessary for the maintenance of said Float; and also the gangway and necessary approaches to said Float with the right of ingress and egress to and from said Float by land and water.”

TO HAVE AND TO HOLD, the above-described premises with the appurtenances, unto the said sec-

ond parties, their executors, administrators and assigns from the first day of November, 1915, for and during the full term of one year from said date.

And the said second parties, in consideration of the leasing of the premises aforesaid by the said first party to the said second parties, do covenant and agree, with the said first party, to pay to the said first party as annual rent for said demised premises the sum of Three Hundred (\$300) Dollars, payable in monthly installments of Twenty-five (\$25) Dollars on the first of each and every month during the full term of this lease contract.

And the said second parties further covenant with the said first party that they will keep said demised premises in a clean, and wholesome condition, in accordance with the ordinances of the said town of Douglas, and that, at the expiration of the time in this lease mentioned they will yield up the said premises to the said first party in as good condition as when entered upon, loss by fire, inevitable accident and ordinary *ware* thereof and damage by the elements alone excepted.

It is further agreed by the said second parties that they will not sublet nor under-let said premises nor any portion thereof nor sell, transfer nor assign this lease without first having obtained the written consent of the said first party.

It is expressly agreed and understood by and between the parties aforesaid, that if the rent above reserved, or any part thereof shall be unpaid, on the day of payment wherein it ought to be paid as aforesaid, or if default be made in any of the covenants

herein contained to be kept by the said second party, their heirs, administrators or assigns, it shall and may be lawful for the said first party, at its election to declare said term ended and re-enter the said premises and expell all persons therefrom, using such force as may be necessary in so doing. [5]

It is further understood and agreed that all the conditions and covenants contained in this lease shall be binding upon the executors, administrators and assigns of the parties to these presents respectively.

IN WITNESS WHEREOF, the said parties hereto have hereunto set their hands this 13 day of November, 1915.

CITY OF DOUGLAS,

A Municipal Corporation.

By PETER JOHNSON,

President of Common Council and Ex-officio Mayor,  
First Party.

C. P. MORGAN,

R. B. COCHRAN,

Second Parties.

Witnesses:

JOE ROBERTSON,

FRANK OLIVER.

United States of America,  
Territory of Alaska,—ss.

THIS CERTIFIES, that on this 13th day of November, 1915, before me the undersigned, a notary public in and for the Territory of Alaska, duly commissioned and sworn, personally appeared Peter Johnson, to me known to be the president of the

8      *Juneau Ferry and Navigation Company*

Common Council of the town of Douglas, and ex-officio Mayor of the same, and also to me personally known to be the individual who signed the foregoing instrument on behalf of the town of Douglas, as the party of the first part thereof, and acknowledged to me that he signed the same on behalf of the said first party; and that he was authorized so to do by the Common Council of the said town of Douglas at a regular meeting held on the first day of November, 1915; and also appeared personally C. P. Morgan and R. B. Cochran to me known to be the individuals described in and who signed the foregoing instrument as the parties of the second part thereof, and acknowledged to me that they signed the same as their own free and voluntary act and deed for the uses and purposes herein mentioned.

IN WITNESS WHEREOF, I have hereto set my hand and official seal the day and year in this certificate first above written.

[Seal]

R. R. HUBBARD,  
Notary Public for Alaska.

My Commission expires March 21, 1916.

True copy of the original Exhibit "A." [6]

[Exhibit "B" to Complaint—Notice, etc.]  
COPY.

Douglas, Alaska, Nov. 5th, 1915.

To the Juneau Ferry & Navigation Company, and to  
all Persons Operating Boats to and from the  
North Float at the City Dock, Douglas.

You are hereby notified that at the Council meeting held in Douglas on November 1st., the north float

of the City Dock was leased to the Island Ferry Co. for a period of one year and is their exclusive property for that period. Any person operating boats to and from said float or in any manner trespassing on same without permission from the Island Ferry Company will be prosecuted.

W. A. SHAFER,  
City Marshal.

Copy of the above served on F. Panter at 11:35  
A. M., Nov. 5th, 1915.

W. A. SHAFER,  
City Marshal.

Exhibit "B."

COPY.

Douglas, Alaska, Nov. 13th, 1915.

Mr. E. J. Margrie, Manager,  
Juneau Ferry & Navigation Company,  
Juneau, Alaska.

Dear Sir:

This is to acknowledge receipt of your letter of the 12th inst. In reply you are advised that the City Council on Nov. 1st., leased the North float of the City dock to the Island Ferry Company for a term of one year commencing on November 1st., 1915, at a rental of \$25 per month. This float has been delivered over to the Island Ferry Company and to their exclusive use.

The south float is still available to the public. The City Council has acted wholly within its rights and has not deprived the public of the use of a public float.

It is not the purpose of the Council to maintain



two floats and we feel under no obligations to your Company to maintain a free additional float on the north side of the City dock. The lease has [7] been given and the Island Ferry Company is now in possession of the NORTH FLOAT. Any further negotiations you have should be conducted with them.

[Seal]

PETER JOHNSON,  
Mayor.  
R. R. HUBBARD,  
City Clerk.

Exhibit "B."

COPY.

Douglas, Alaska, Nov. 11th, 1915.

Juneau Ferry & Navigation Co.,

Juneau, Alaska.

Gentlemen:

I herewith acknowledge receipt of your letter dated Nov. 10th, addressed to the writer, also of letter dated Nov. 5th, 1915, addressed to Mr. W. A. Shafer, City Marshal. In answer I will state that the records of the Council Meeting held Nov. 1st., show that a motion was made and seconded that the North Float of the Douglas City Wharf be leased to the Island Ferry Co. for one year at a rental of \$25 per month, payable in advance. Motion carried. I am informed by the City Attorney that Mr. Morgan of the Island Ferry Co. informed him that Mr. Margrie of the Juneau F. & N. Co. refused to cease landing his boats at the float which the City leased to Mr. Morgans Co. until he was notified by the City authorities of Douglas that the float had been leased.

(the communication continues) "Will you kindly have Mr. Shafer give a written notice to whoever is in command of the 'Teddy' on her next trip she makes to this float. I enclose herewith a notice which I think will answer the purpose." I am unable to make any further statement as the Council have had no meeting since my return from Seattle on the 20nd. inst. All communication on file in this office will be presented to the Council at their next meeting.

[Seal]

Yours truly,

R. R. HUBBARD,  
City Clerk.

Exhibit "B."

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Nov. 15, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. Original. In the District Court for the District of Alaska, Division No. 1. C. P. Morgan et al., Copartners Doing Business Under the Name of the Island Ferry Co. vs. Juneau Ferry and Navigation Company, a Corporation. Number ——. Complaint. George Irving and S. H. Millwee, Attys. for Pltffs. [8]

*In the District Court for the District of Alaska,  
Division No. One, at Juneau.*

No. 1392-A.

C. P. MORGAN, R. B. COCHRAN and H. JOHANSEN, Copartners, Doing Business Under the Name and Style of the ISLAND FERRY COMPANY,

Plaintiffs,

vs.

JUNEAU FERRY AND NAVIGATION COMPANY, a Corporation,

Defendant.

**Order to Show Cause and Temporary Restraining Order.**

The plaintiffs in the above-entitled cause, having commenced an action in the District Court for the First Judicial Division, Territory of Alaska, against the above-named defendant, and having prayed for an injunction against said defendant requiring it to refrain from certain acts in said complaint and hereinafter more particularly mentioned.

Now, on reading said complaint in said action (duly verified by oath of said plaintiff, C. P. Morgan) it is ordered, that on the 22d day of November, 1915, and the hour of 10 o'clock A. M., at the courthouse at Juneau, said Juneau *and* Ferry and Navigation Company, defendant herein show cause, if any it has, why an injunction *pendente lite* should *not issued* as prayed for in the complaint; and in the meantime, and until further order of the Court,

you, the said Juneau Ferry and Navigation Company and all your agents, servants and employees and all others acting in aid or assistance of you are enjoined and restrained from using, landing at, or entering in or upon or otherwise trespassing in or upon that certain float and premises situate on the north side of the city dock at the town of Douglas, Alaska, as is more particularly described in plaintiffs' complaint; or in any other manner interfering with plaintiffs' exclusive use and possession thereof. The order to be in force from and after the filing of a bond of indemnity in the sum of \$500 to be approved by this Court.

ROBERT W. JENNINGS,  
Judge.

Entered Court Journal No. L, pages 181-82. [9]  
United States of America,  
Territory of Alaska,  
Division Number One,—ss.

I, H. A. Bishop, United States Marshal for the First Division of Alaska, do hereby certify and return that I received the within order to show cause and temporary restraining order on the 16th day of November, 1915, at Juneau, Alaska, and that I served the same on the 16th day of November, 1915, at Juneau, Alaska, on the Juneau Ferry and Navigation Co., by handing to and leaving with E. J. Margrie, Manager of said company, a certified copy of the original writ, said service made personally and in person.

Dated at Juneau, Alaska, November 16th, 1915.

14     *Juneau Ferry and Navigation Company*

Marshal's Fees \$3.00. Paid by George Irving,  
Atty.

H. A. BISHOP,  
United States Marshal.  
By J. L. Manning,  
Office Deputy.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Nov. 15, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. Original. In the District Court for the District of Alaska, Division No. 1. C. P. Morgan et al., Copartners Doing Business Under the Name of the Island Ferry Co. vs. Juneau Ferry and Navigation Company, a Corporation. Number ——. Order to Show Cause and Temporary Restraining Order. George Irving and S. H. Milwee, Attys. for Pltffs. [10]

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*In the District Court for the Territory of Alaska,  
Division No. One, at Juneau.*

No. 1392-A.

C. P. MORGAN, R. B. COCHRAN and H. JOHANSEN, Copartners, Doing Business Under the Name and Style of the ISLAND FERRY COMPANY,

Plaintiffs,

vs.

JUNEAU FERRY & NAVIGATION COMPANY,  
a Corporation,

Defendant.



**Answer to the Rule to Show Cause.**

Now comes the defendant by its attorney and for answer to the rule to show cause why a temporary injunction should not issue herein, alleges as follows:

**I.**

Said complaint does not state facts sufficient to authorize the issuance of any injunction, temporary or otherwise, in this, that it appears from said complaint and the exhibit attached thereto that the plaintiffs are claiming the right to the exclusive possession and use of the float mentioned in the complaint under a pretended lease from the city of Douglas, Alaska, which said lease purports to be executed by Peter Johnson, President of the Common Council and ex-officio Mayor, while the said Peter Johnson as a matter of law had no authority to execute any such lease and there are no facts alleged showing any such authority to have been given him. [11]

**II.**

The city of Douglas or its Common Council have no legal authority to execute the pretended lease to the said dock alleged in the complaint, or any lease of said dock or float owned by said municipality to the exclusion of others desiring similar accommodation thereat.

**III.**

And the defendant further alleges that it is engaged in the business of operating a ferry between the towns of Juneau, Douglas, Treadwell and Thane all on Gastineau Channel, a navigable arm of the

Pacific Ocean, and has been so engaged for more than twenty years last past; that it has invested in its vessels and other appurtenances in connection with the said business the sum of upwards of \$50,000. That the float referred to in the complaint is a part of a public dock on the navigable waters of Gastineau Channel, constructed by the municipality of Douglas City, Alaska, some years ago under the authority contained in the Alaska Civil Code authorizing municipalities to provide for the construction and maintenance of streets, alleys, sewers and wharves, that said authority, as the defendant is advised and therefore alleges, only permits the construction and maintenance of such wharves for the use of the general public desiring accommodation thereat and does not authorize the granting of special or exclusive privileges to any person or corporation. That a part of the public served by the defendant find that it is more convenient to land at said float than elsewhere and the defendant is and has ever been ready and willing to pay all reasonable charges to the said city of Douglas when it shall have established a regular charge for the use of [12] said float as one of its landing places for the accommodation of the general public. And the defendant further alleges that it was the purpose and intention of the Common Council of the city of Douglas and of the plaintiffs in executing said pretended lease, to give to the plaintiffs a special privilege and advantage in the operation of their said ferry-boat to the detriment of the general public seeking transportation to and from said town, and especially to the detriment of the

business of the defendant. And the defendant further alleges that if the injunction herein prayed for is granted, it will result in giving to the plaintiffs a special and exclusive privilege for the use of public property and a part of public highways of the said city of Douglas and a part of the public highway leading from said city to the outside world, and will result in a great and continuing damage to the business of the defendant.

J. H. COBB,  
Attorney for Defendant.

United States of America,  
Territory of Alaska,—ss.

E. J. Margrie, being first duly sworn, on oath deposes and says: I am general manager of the above-named defendant corporation. The facts set forth in the above and foregoing answer are true.

E. J. MARGRIE.

Subscribed and sworn to before me this the 18th day of November, 1915.

[Notarial Seal]

E. L. COBB,  
Notary Public in and for Alaska.

My commission expires Dec. 3, 1918.

Filed in the District Court, District of Alaska,  
First Division. Nov, 22, 1915. J. W. Bell, Clerk.  
By ———, Deputy. [13]

*In the District Court for the District of Alaska,  
Division No. One, at Juneau.*

No. 1392-A.

C. P. MORGAN and R. B. COCHRAN and H.  
JOHANSEN, Copartners, Doing Business  
Under the Firm Name and Style of THE  
ISLAND FERRY COMPANY,  
Plaintiffs,

vs.

THE JUNEAU FERRY AND NAVIGATION  
COMPANY, a Corporation,  
Defendant.

**Injunction Order.**

The plaintiffs in the above-entitled cause having commenced an action in the District Court for the District of Alaska, Division No. One, against the above-named defendants and having prayed for an injunction against the said defendant requiring it to refrain from certain acts in said complaint and hereinafter more particularly mentioned, upon reading the said complaint in said action duly verified by the oath of C. P. Morgan, one of the plaintiffs and upon the hearing of proof under oath in open court and it satisfactorily appearing to me that it is a proper case for an injunction *pendente lite* and that sufficient grounds exist therefor and an injunction bond having been given, approved and as required by me in the sum of One Thousand Dollars, it is therefore ordered by me, the Judge of the said District Court that until further order in the premises, you, the said

Juneau Ferry and Navigation Company, a corporation, and all your servants, counsellors, attorneys, solicitors and agents and all others acting in aid or assistance of you and each and every of you do absolutely desist and refrain from landing your boats at that certain north float or landing place located on the north side [14] of the city dock or wharf at the town of Douglas, Alaska, or in anywise trespassing upon or occupying same.

To the Juneau Ferry and Navigation Company, a corporation.

Dated this 14th day of December, 1915.

ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska, First Division. Dec. 14, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [15]

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*In the District Court for the Territory of Alaska,  
Division Number One, at Juneau.*

No. 1392-A.

C. P. MORGAN and R. B. COCHRAN and H. JOHANSON, Copartners, Doing Business Under the Name and Style of THE ISLAND FERRY COMPANY,

Plaintiffs,

vs.

JUNEAU FERRY & NAVIGATION CO.,

Defendant.



**Bill of Exceptions.**

BE IT REMEMBERED that on the hearing and trial of the motion for a temporary injunction pending the final trial of this suit, the following testimony was introduced in addition to the sworn complaint and the affidavits to the answer to the rule to show cause why such temporary injunction should not be issued, and the following proceedings had, to wit:  
[16]

*In the District Court for the District of Alaska,  
Div. No. 1, at Juneau.*

No. 1392-A.

C. P. MORGAN and R. B. COCHRAN and H.  
JOHANSEN, Copartners, Doing Business  
Under the Name and Style of the ISLAND  
FERRY COMPANY,

vs.

JUNEAU FERRY AND NAVIGATION COM-  
PANY, a Corporation,

**Transcript of Testimony.****INDEX.**

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*In the District Court for the District of Alaska,  
Division No. 1, at Juneau.*

No. 1392-A.

C. P. MORGAN, R. B. COCHRAN and H. JOHAN-  
SEN, Copartners, Doing Business Under the  
Name and Style of the ISLAND FERRY  
COMPANY,

vs.

JUNEAU FERRY AND NAVIGATION COM-  
PANY, a Corporation,

TRANSCRIPT OF TESTIMONY.

GEORGE IRVING, Esq., Appearing for  
Plaintiffs;

JOHN H. COBB, Esq., Appearing for Defend-  
ant.

**[Testimony of M. J. O'Connor, for Plaintiffs.]**

M. J. O'CONNOR, being duly sworn, testified on  
behalf of plaintiffs as follows:

Direct Examination by Mr. IRVING.

Q. Your name?      A. M. J. O'Connor.

Q. You reside where?      A. Douglas.

Q. How long have you resided in Douglas?

A. About 17 years.

Q. State whether or not you were ever Mayor of  
the city of Douglas.      A. Yes, sir.

Q. What years, if you remember?

A. I think I was Mayor of the town from 1909 to  
1915.

Q. Nineteen—

A. Served six years Mayor of the town.

(Testimony of M. J. O'Connor.)

Q. Do you remember about the time when a certain float was [18] constructed—you remember the time of the erection and building of the city dock?

A. I do, sir, very well.

Q. Who was at the head of town affairs at that time?

A. I was. I advocated and caused to be built the city dock.

Q. Yes?

A. To break the monopoly that existed by the Juneau Ferry and Transportation Company.

Q. Do you remember the building of any float on the north side of that dock? A. Yes, sir.

Q. When, about what year was that float put in there. Mr. O'Connor?

A. When we built the dock we also built a float for the public, but we found by experience that we put it on the wrong side of the dock, it was on the north side of the dock, and it stood there for about two years, but it was—on account of the elements and exposed to the north wind, we found it was on the wrong side of the dock, and I think about 1911 we transferred the float to the other side.

The COURT.—Is that the float in controversy?

A. That is the float, north side, the float in controversy is on the north side. Now, the float used by the general public is on the south side where sheltered from the weather.

Q. (By Mr. IRVING.) Now, Mr. O'Connor, when you found that the north winds and seas came on the north float what did the city do regarding the

(Testimony of M. J. O'Connor.)

south float, why, what did they do regarding making it—

A. We put the float that was originally on the north side on the south and added on, making ample accommodations for tying up—the float now on the north side of the city dock is a float that Mr. Murray gave me, Mayor of the town acting for the city. It was in disuse and he gave me this and I had [19] it erected where it now stands as an inducement for an independent ferry to land.

Q. Why was it that you offered—or did you build the float for an inducement for the ferry to land?

Mr. COBB.—I object to that, your Honor.

The COURT.—Well, this is a restraining order, not a trial of a case. I will admit it.

Q. Why was it that this float was put there for an inducement for opposition ferry to land?

A. Because we were paying an exorbitant rate between Douglas and Juneau and there was no place for a ferry to land.

Q. Did the Juneau Ferry and Navigation Company have a wharf and float of their own at that time?

A. Yes, sir, they always had. I might state for the benefit of the Court that this float that is in use now, that has been leased by the city to the Island Ferry Company, was originally put up by Mr. Murray of Douglas, to provide a landing place for an independent ferry and it was no sooner constructed, your Honor, than the Juneau Ferry and Navigation Company leased the float from Mr. Murray, fenced up

(Testimony of M. J. O'Connor.)

the front of it, prevented the public from landing there and using it, and still took their quarter from the people of Douglas.

Q. Did you ever notice a sign upon the float or wharf of the Juneau Ferry Company with regard to boats landing there? A. Beg pardon?

Q. Did you ever notice a sign upon the float or dock regarding other boats landing there?

A. I have, sir. A man could not land, prior to this city dock being built, could not land in Douglas without he waded up the beach in mud, if he, even if he rowed to Douglas in a skiff he would not be allowed to land at the ferry dock. [20]

Q. At the time of the erection of the city dock at Douglas, this float being a part of it, was there—you, as Mayor—did not have any correspondence or talk with the officers of the Juneau Ferry and Navigation Company regarding it?

A. At the time the dock was erected?

Q. Yes.

A. Mr. Margrie went over into my office and tried to induce me not to build that dock.

Q. Tried to induce you not to build that dock?

A. He said the Juneau Ferry and Navigation Company were not making a cent, and he wanted me to come over to Juneau and look over the books and see how they were losing money, but this last year the city dock that lost so much money for Mr. Margrie on the other side netted the city of Douglas a little less than six thousand dollars.

Q. And this float is a part of that dock?



(Testimony of M. J. O'Connor.)

A. This float is a part of that dock.

Q. And that dock is being used by the general public for the general good and general profit, is that so?

A. By the general public for the general good, and this float—while I am not on the Council, this float was leased to this company for the general public and for the general good.

Q. Mr. O'Connor, the condition of this particular float that has been leased, has it been in condition for the landing of boats at it for some time past, or has it fallen into disuse?

A. Very few landed, but it has not been kept in repair; in fact, no boat could land there to-day.

Q. As a citizen of Douglas, do you know whether the Juneau Ferry and Navigation Company ever made regular landings prior to the time lease was given to the Island Ferry? [21]

A. No, sir, they never did.

Q. They got just as good landing?

A. A better landing, their own right to-day.

Q. And their leasing—this landing that has been leased to the Island Ferry Company is in—the gangway on the float leading to what street in Douglas—leads into Front Street, don't it?

A. Leads into Front Street.

Q. Now, the landing float of the ferry company, of the Juneau Ferry and Navigation Company, that leads into Front Street also, doesn't it?

A. Yes, sir, into the same street.

Q. What would you say as to the two floats, as a citizen of Douglas and ex-Mayor of the town, as to

(Testimony of M. J. O'Connor.)

the position of the two floats as being, one being better than the other, or as to whether they are located in such a shape they would both be convenient?

A. One is just as convenient as the other. The fact of the matter is that the float owned by the Juneau Navigation Company to-day is the better than the one leased to the other parties.

Q. Now, the float that has been maintained by the city of Douglas on the south side of the wharf, in what condition is that as against the condition of the float on the north side where the Juneau ferry insists on landing?

A. The float on the south side of the dock is the best—from the north wind—when no wind—

Q. And the condition of the property of the Juneau Ferry and Navigation Company, piles and floats—

A. It is the best float in Alaska.

Q. And when a boat doesn't get into that float on the south side—now, just before that, what is the south side float, as the citizens and yourself—how do you recognize it?

A. As the float for the general public to tie up.

[22]

Q. As the float for the general public to tie up. That is, Mr. O'Connor, I take it, that float was made and dedicated as a public utility for the general use of the public?

A. That is what it was built for.

Q. State what this other float on the north side was built for?

A. That was built to provide a landing for an independent ferry if such came on the run.

(Testimony of M. J. O'Connor.)

Q. Was it ever intended for general utility purposes outside of that?

A. It was not. It has been used for some—I put the float in, acting for the city and I know what I put it in for, I put it in to help the people of Douglas to get better rates between Juneau and the Island.

Q. What is the approximate size, if you know, of the float on the north side that has been leased to the Island Ferry Company, what is the size?

A. Probably forty feet long; but it is almost submerged, it is water-logged—it is only—that was used five years by Mr. Murray.

Q. Now, as against that, what is the condition of the float on the south side where the Juneau Ferry and Navigation Company have been landing their gas-boat—what is the name of that?

A. “Teddy.”

Q. What is the condition of that float as against the condition of the float on the north side where they have had a landing unobstructed?

A. No comparison.

Q. No comparison at all?      A. No.

Q. Which is better?      A. The one on the south.

Q. Now, in the answer—do you know as a citizen of Douglas as to whether there has not been any remonstrance on the part of the public against the Juneau Ferry and Navigation Company landing at this south side float? [23]

A. Not a man, no.

Mr. COBB.—I object. Irrelevant and immaterial.

(Testimony of M. J. O'Connor.)

The COURT.—Whether there has been any remonstrance of the public in Douglas against the Juneau Ferry and Navigation Company landing at this south float?     A. Yes.

The COURT.—It will be overruled. I will take the whole thing in—

Mr. IRVING.—It may be material.

A. It has been for the public including the Juneau Ferry and Navigation Company.

Q. Do you know the present condition of this float on the north side—state to the Court what condition it is in now?

A. It is in condition for —— —— boat right now.

Mr. COBB.—What boat is that?

A. That is the one that has been lost. There is no boat landing there to-day, neither the Juneau Ferry nor the other one.

Q. Why?

A. Because the weather does not permit them to land there, the float is partially submerged, and the seas are washing over it.

Q. Now, what is the condition of the south float to-day?     A. Good.

Q. A boat can land there?

A. I have been on it, that is ride back and forth, on it, twice, landed without any trouble.

Mr. IRVING.—That is all, Mr. O'Connor.

Cross-examination by Mr. COBB.

Q. Ferry-boats cannot go under the main wharf, can they?

A. Cannot go under the main wharf, no, sir. [24]

(Testimony of M. J. O'Connor.)

Q. Now, the main wharf extends from the city front out to a little island known as Juneau Island?

A. Yes.

Q. In order to reach the south float at all you have to go clear round Juneau Island?

A. Mayflower Island.

Q. Mayflower Island. Is that a fact?

A. Yes, sir, that is a fact.

Q. And quite a lot of time is lost going round there?

A. Not a great deal—takes probably five minutes to get round.

Q. About five minutes lost?

A. About five minutes lost.

Q. At any rate. As a matter of fact, that south float was put up for the small fishing boats?

A. For the general public; and we found it was too small, and I, representing the city, added another—

Q. Mr. O'Connor, just answer the question. It was put up there principally for the use of the small fishing boats to tie up for shelter, was it not?

A. No, sir.

Q. Put up for a ferry?

A. For the use of the general public.

Q. Put up for a ferry? —answer the question, don't sit there—

A. Yes, if the ferry wanted to use it.

Q. If the ferry wanted to use it? A. Yes.

Q. Don't you know no ferry wanted to use it?

A. They are using it now, two ferries used it to-day, to my knowledge.



(Testimony of M. J. O'Connor.)

Q. All right. Why did you put the one on the north side?

A. To induce somebody to put on an apposition ferry, Mr. Cobb.

Q. Why didn't the one on the south side induce some one to put on an opposition ferry?

A. Well, we wanted to save that for the general public. [25]

Q. Yes. Now, the facts about it, Mr. O'Connor, are in ordinary weather, not a day like to-day when you need a sheltered landing place, in ordinary weather it is much more convenient in the ordinary ferry business in Gastineau Channel to use that float on the north side than on the south?

A. Yes, in ordinary weather.

Q. And it was put there for the purpose of providing a landing place for a ferry?

A. Yes, the ferry has got it right now.

Q. That is what it was put there for?

A. Yes, sir, that is what it was put there for.

Q. Now, you stated a moment ago the Juneau Ferry and Navigation Company had never used this float prior to the time the lease—

A. Not until the independent ferry went on.

Q. Are you positive of that?

A. Well, I have never seen them in there to my knowledge.

Q. You stated it as something positive. I want you to tell the Court what you know about it—do you know they never did use it?

A. I know that I never saw them use it.

(Testimony of M. J. O'Connor.)

Q. That is all you know about it?

A. Might have gone in there in the dark.

Q. Might have gone in there in the dark—in the daylight and you not seen them?

A. Well, they might, yes, sir; not likely, they got a better float and just as convenience one as this, Mr. Cobb.

Q. And if anybody wants to land over there they would probably take them there?

A. No, sir, they would not. [26]

Q. Would not?

A. No, sir,—I wanted to land there and your ferry company will refuse to land there—they said positive—also they said they had a float of their own.

Q. I will come back to that in a moment. You stated that they tried to get you, to prevent you from building a public dock there, over there?

A. Yes, sir.

Q. When they wanted to sell you that dock at less money than it cost? A. No.

Q. Didn't they offer to sell it to you?

A. No, sir, did not.

Q. Positive of that?

A. I am positive of that, yes, sir; I know what they offered—that wasn't the first time—there was a few citizens once had attempted to build a dock; had piles bought—why didn't they build a dock? Ask Mr. Margrie—I built the dock, though.

Q. You built the dock? A. Yes, sir.

Q. And you put in this float as a public ferry landing? A. The float on the south side.

(Testimony of M. J. O'Connor.)

Q. What did you put in the one on the north side for?

A. I told you what I put it in for.

Q. Let us hear it again.

A. To give an independent boat—for a landing for an independent boat.

Q. For a ferry landing?

A. Yes, sir, for a ferry landing. [27]

Q. (By Mr. IRVING.) Now, Mr. O'Connor, you put in that north float so that the independent ferry would have a convenient place to land?

A. That is what it was put in there for, for the benefit of the people.

Q. For all the city, looking at this time for an investment for the people of Douglas to get another ferry to reduce the fare?

A. It was leased for the public good—this Juneau Ferry Company they are going in and out there empty-handed.

Q. Now, Mr. O'Connor, right in that connection. Mr. Cobb asked you as to whether or not the Juneau Ferry and Navigation Company had ever landed—now, I ask you this; did the Juneau Ferry and Navigation Company ever make general use of this particular north side float for a ferry landing prior to the time of the Island people—

A. They never did, they might have landed there but didn't use it as a general landing dock.

Q. I take it they might have landed there at times? A. Yes.

Q. Never used generally by them?

(Testimony of M. J. O'Connor.)

A. Never was.

Q. Mr. O'Connor, does the Juneau Ferry and Navigation Company own a dock and a float there of their own?

A. They own a dock and float much better than this one that has been leased.

Q. And they have continuously landed—by that I mean generally continuously or continuously generally, either way you want to put it—landed at their own float at all times?

A. For twenty years.

Q. For twenty years. Before the steamers ran in, on the Southeastern Alaska route, where did they land? A. At the city dock. [28]

Q. Prior to the time of the building of the city dock where did they land?

A. At the ferry dock.

Q. Ferry dock. Is that dock controlled and owned by the Juneau Ferry and Navigation Company?

A. Juneau Ferry and Navigation Company.

Q. Now, when the city dock was built, Mr. O'Connor, did these boats immediately transfer, all the Southeastern Alaska boats, there?

Mr. COBB.—Taking a great deal of time.

A. No, they didn't. They —— the town for a year, they tried to muzzle the town and break the spirit of the people but we voted them out; they are landing there now.

Q. Who was behind that move? A. I was.

Q. Who was behind the move to keep these steam-

(Testimony of M. J. O'Connor.)

ships, boats from landing at the city float?

A. Well, I imagine the Juneau Ferry and Navigation Company.

Q. Why would they be behind such a move?

Mr. COBB.—I object.

Mr. IRVING.—

The COURT.—I don't know what you are talking about. The question has been answered.

Mr. IRVING.—Well, I just wanted to talk.

The COURT.—Proceed. Ask another question.

Q. (By Mr. IRVING.) Now, Mr. O'Connor, what was your answer there, I didn't get it.

Mr. COBB.—It has been answered. I don't want to—

The COURT.—You move to strike it out? Your motion is overruled. Ask another question.

Q. How long a period was it this steamboat—the town of Douglas? A. About six months. [29]

Mr. COBB.—Now, wait a minute. I ask to have his answer stricken. Irrelevant and immaterial.

The COURT.—Overruled.

Mr. COBB.—Exception.

The COURT.—This is not a trial of the case, gentlemen.

Mr. COBB.—The Court thinks it is material.

The COURT.—Well, if it isn't material it will not hurt you.

Mr. COBB.—This isn't true, I don't want to go—

The COURT.—If it isn't material you don't have to go.

Mr. COBB.—I think the Court should rule on



(Testimony of M. J. O'Connor.)

these questions out of fairness—I realize it is doing Mr. O'Connor a great deal of personal good to roast the Ferry Company.

Mr. O'CONNOR.—No, sir, it does me a lot of good to stand here and represent the people here.

The COURT.—Don't go too far.

Mr. IRVING.—That is all.

Q. (By Mr. COBB.) Mr. O'Connor, the time you exercised this wonderful public spirit of which you speak you were agent for a steamship company?

A. No, sir, I was not.

Q. Not for the Humboldt?

A. No, sir, I was not. I am agent now, I was not then.

Q. Was not then? A. No, sir.

Q. Positive of that?

A. I am. I built that city dock, I had nothing to do with the Humboldt steamship.

Q. Who was the agent then?

A. Mr. Hubner, I think, Hubner, the druggist.

A. Well, I really can't tell you now. [30]

Q. When did you become the agent for it?

Q. You mean you can't or you won't tell?

A. What?

Q. You can't or won't tell?

A. I have nothing to hide here. It would not matter if I was agent for the steamship company.

Q. Can you tell when you became agent?

A. I really don't know, I would have to look up the records and find out, that agency is a very small matter with me. I backed the Humboldt Steam-

(Testimony of M. J. O'Connor.)

ship Company just for the reason I am backing up this independent boat to-day, to save the people of Alaska—

Mr. COBB.—I wish the Court would compel the witness to answer and not talk so much.

Mr. O'CONNOR.—I will answer.

Q. Do you know whether it was before or after you built the dock?

A. After, I am satisfied of that.

Q. You got a commission on all freight that was landed there? A. A commission?

Q. Yes.

A. Oh, no, sir, I didn't get any commission.

Q. What did you get?

A. What did I get? I got nothing. What do you mean?

Q. As agent?

A. I got five per cent on all the tickets I sold. I got nothing for freight landed; doesn't matter to me whether it is one pound or ten thousand.

Mr. COBB.—That is all.

Mr. IRVING.—That is all, Mr. O'Connor. [31]

**[Testimony of Henry Brie, for Plaintiffs.]**

HENRY BRIE, being duly sworn, testified on behalf of the plaintiffs, as follows:

Examination by Mr. IRVING.

Q. Your name? A. Henry Brie.

Q. Where do you live? A. At Douglas, Alaska.

Q. How long? A. About eleven years.

Q. Ever a member of the City Council of Douglas?

A. Yes, sir.

(Testimony of Henry Brie.)

Q. What year were you a member of the City Council?     A. About '10, '11 and '12.

Q. About '10, '11 and '12. Were you a member of the City Council at the time the float on the north side of the city dock was placed there?

A. Yes, sir.

Q. Do you know how or what for it was placed there and for what purpose?     A. Yes, sir.

Q. Tell the Court.

A. We spoke about it in the Council-room to put a float there to have an opposition ferry and at that time I believe there was some parties wanted to run.

Q. Willing to run?

A. Willing to run it, didn't get it.

Q. Do you remember on account of these parties talking about putting in an independent float that the people—

A. The float was built and Mr. O'Connor got a present of Mr. Murry for a float, giving the float.

Q. That goes to the city?

A. He reported it at the Council meeting that time, and if he built a float he gets the float from Murray, if he build it, and we build that float that time.

Q. And tell the Court positively now, if you can, just what the float was built for, make it a precise answer.

A. It was built for lease or rent for the benefit of the city of Douglas and for the citizens of Douglas.

[32]

Q. For the purposes of an independent ferry?

(Testimony of Henry Brie.)

A. Independent ferry, yes, sir.

Q. Why was that done?

A. Well, in the first place, we thought it a good investment, in the second place to reduce the fare between Douglas and Juneau.

Q. And you as Councilman at that time were acting for the public good?

A. People of Douglas, yes, sir.

Q. And that is the reason, and acting for the public good, why the north float was put there?

A. Exactly.

Q. And another reason, it was more convenient for the ferry crossing to land quickly?

A. Yes, sir.

Q. Were you a member of the Council when the south float was built?     A. Yes, sir, I was.

Q. What was that float for?

A. It was for landing, for everybody, ferries or individuals.

Q. Do you know the condition of this north float at this time?     A. Yes, sir.

Q. What kind of condition?

A. She is in very poor condition at this time.

Q. Is it water-logged?

A. The float is water-logged.

Q. How far is the platform on these logs from the surface of the water?

A. To-day she is under water, to-day, but yesterday she was a few feet.

Q. During your time as member of the Council and also during your residence in Douglas do you

(Testimony of Henry Brie.)

know as to whether or not the Juneau Ferry and Navigation Company have used this particular northside float for general landing of their ferry?

[33]

A. Not for general landing, no, sir; she used it once when the old wharf was repaired; I know they landed.

Q. When their own was—

A. When they could not land on their own float.

Q. When they could not land on their own float?

A. Yes, sir.

Q. Have you as a citizen of Douglas traveling on these ferries asked to be landed at that float?

A. Yes, I did.

Q. Tell the Court.

A. Well, I asked once Waldo States why don't he go to the new float, that she was built to land over there; he say his orders are to land on their own dock.

Q. Had a float of their own?

A. Had a float of their own.

The COURT.—He said that?

A. His orders was to land on the Juneau Ferry and Navigation Company's and he had to go there.

Q. And he refused to land you at the other float?

A. Yes, certainly, he landed me on the Juneau Navigation Company; and another time I spoke—in liquor business I speak to Zuenda Company—I tell him I want my beer landed on the new float what was built that time; he told me Mr. Margrie told him he got his own float to land on, wouldn't land on anybody else's float.



(Testimony of Henry Brie.)

Q. (By IRVING.) On the beer that was landed at the ferry was there a dockage charge to you?

A. Yes—I know he pays ten cents for bringing it over.

Q. As to the dockage you don't know?

A. No, he pays, the brewery man pays the delivery man and the ferry. [34]

Q. Yes. About how large, Mr. Brie, is this float on the north side as compared with the float on the south side? A. About how wide?

Q. Just as near as you can judge, how large?

A. It is much nearer than the south side.

Q. Much shorter? A. Much shorter, yes.

Q. And the south side float is a protected float?

A. That is the best float to land on for any boats, from the north wind particularly.

Q. And the north float is not?

A. No, on the north you can land any time, any weather.

Q. And you as a member of the Common Council positively state it was not intended to build—

Mr. COBB.—I object. He has not stated anything of the kind. Counsel is putting testimony in his mouth—Mr. Brie says—

Mr. BRIE.—I do and always will, Mr. Cobb, I do make the statement and always will.

Mr. IRVING.—Sure he did.

Mr. COBB.—He would not have said it the way counsel—

The COURT.—Don't lead the witness.

Mr. COBB.—I object to leading the witness.

(Testimony of Henry Brie.)

The COURT.—Objection is to the question as leading. Ask him in another form.

Q. (By Mr. IRVING.) Now, state to the Court what you know about this north side float of your own knowledge, and the south side float as regards the relation of one float, to the general citizenship of the town and the other float as regards the general citizenship of the town.

A. During that meeting of the City Council the question came up about the south float when we intended to build the [35] north float and we agreed, all agreed to it, that the *the* south float is to be for landing, for everybody, passenger, ferries or any one, but the north float is to be either leased or done something to bring revenue for the city; that was agreed upon that meeting; we talked it over and agreed to it.

Q. As to whether or not this north side float has been kept in repair by the city when it was not leased?

A. It was kept in pretty good repair when we were in.

Q. Has it been kept in repair of late?

A. No, it hasn't; of course, Mr. Smith—of the Juneau Ferry and Navigation Company and he is a councilman.

Q. Mr. Elmer Smith?

A. Mr. Elmer Smith, yes.

Q. And he was—

A. He didn't like the idea of being outvoted.

Mr. IRVING.—That is all.

(Testimony of Henry Brie.)

Cross-examination by Mr. COBB.

Q. Did you ever fix any charges to be paid for landing at this north float?     A. Sir?

Q. City Council fix any charges?

The COURT.—Fix any rates, did the Council ever fix any rates?

A. No, there was no rates; if any parties landed there rates all right but if we could find somebody only to lease it then charge, would have charged what was reasonable.

Q. (By Mr. COBB.) It was put there you state, you agree with Mr. O'Connor, primarily for ferry landing?

A. For landing or for revenue to bring revenue into the city, that was what it was there for. [36]

Q. Now, as a matter of fact, it was put there for a ferry landing because the south float is not very convenient for ferry purposes, is it, on account of going around the island?

A. Not exactly, not for that reason.

O. What reason?

A. Only one reason, it was put there for the benefit of the citizens of Douglas to bring in revenue and get some money out of it.

Q. The south float?     A. The north float.

Q. I ask you if the north float was not put in for a ferry landing because the south float is not very convenient for the ferry business on account of having to go around the island?

A. I believe that the south float is just as convenient as the north float, this kind of weather it is more convenient.

(Testimony of Henry Brie.)

Q. This kind of weather. You know you have to lose quite a bit of time in going around the island?

A. It is better to lose time than person's life.

Q. Exactly. In ordinary weather how would it be? A. How would it be?

Q. The north float?

A. You can land at the north float easy, yes, and it is much more convenient for a person that has the lease.

Q. It is more convenient? A. Yes.

Q. Regardless of the lease? A. —

Q. How is that?

A. If you haven't lease you can't handle that.

Q. That is the question we are trying. Independent of the [37] lease, isn't it much more convenient?

A. I am not a steamboat man.

Q. You are not a steamboat man. Now, Mr. Brie, when did you put in this float?

A. I believe it was in 1911.

Q. 1911. Four years ago? A. Yes.

Q. And you never leased it at all, never got any revenue from it until the first of this year—the first of this present month?

A. Yes, we could not get anybody. The Juneau Ferry Company put everybody out.

Q. I am not asking what the Juneau Ferry Company— A. I thought you did.

Q. I am asking you a simple question: if you ever leased it or got any revenue?

A. No, we had some applications but they didn't come through.

(Testimony of Henry Brie.)

Q. Who made application?

A. Several boys over there.

Q. Who?

A. People from down below,—wanted to put in an independent ferry?

Q. Who? A. A fellow from Seattle.

Q. What is his name? A. Ebner.

Q. William Ebner?

A. No, no, Frank Ebner is his name.

Q. Did he negotiate with you about it?

A. He spoke to me about it.

Q. Wanted to lease it? A. We didn't lease it.

Q. Did he want to lease it?

A. He wanted to take it so—

Q. —Can't he land there without leasing?

A. No, he couldn't, not run a ferry, he land, get in with a small boat and get away.

Q. What prevented him from landing ferry?

A. Juneau Ferry Company tried to prevent these fellows to [38] land, told them not to land.

Q. Elmer Smith prevent him? A. Tried to.

Q. Would Elmer Smith prevent Ebner?

A. No.

Q. What prevented him?

A. I am telling you what Elmer Smith did to the others.

Q. What prevented—what would Smith do to prevent Ebner from landing there?

A. Well, he didn't, couldn't prevent him from landing because he didn't land there. He didn't have any boat. He just looked around for an opening to



(Testimony of Henry Brie.)

put a ferry-boat on; that is the idea.

Q. And he wanted to know if there was a dock?

A. Yes, sir, he came out to my place of business.

Mr. COBB.—That is all.

Q. (By Mr. IRVING.) You say you could not lease, tell the Court the reasons, if you know, why it could not, the one the Island Ferry Company has now got.

A. Why it could not be leased at the present time?

Q. No, why it could not be leased in the former times.

A. There was some applications to me privately and others but I guess the business didn't look profitable to them, they didn't lease, it, otherwise they would have leased it.

Q. Was there any float ever built there for an independent you know about? A. No, sir.

Q. You don't know of any? A. No, sir.

Mr. IRVING.—That is all.

Q. (By Mr. COBB.) Mr. Brie, were you a member of the Council at the time this dock was built, city dock?

A. No, I didn't—that was built in several years you know, [39] built several years, the first year I don't know, I was there the second year.

Q. Just for the purpose of clearing up the record: you remember the Juneau Ferry and Navigation Company did offer to sell its float, its dock to the—

A. Its dock, yes, after they went broke, we put them out of business, they tried to sell after we put them out of business, the city put them out of business.

(Testimony of Henry Brie.)

Q. Didn't they offer to sell? A. Yes.

Q. Did you build the dock? A. Yes.

Q. They tried to offer to sell it?

A. For an enormous price, for about forty or fifty thousand dollars.

Q. Didn't they offer to sell it to you for six thousand dollars?

A. No, no, never, no, twenty-five thousand dollars, two years after we built the dock.

Q. You are positive that they didn't offer to sell at eleven thousand dollars, just what it cost them?

A. No, sir.

Q. Before you built it?

A. No, sir, afterwards, four years afterwards, but we wouldn't buy it any way because Margrie was the head of it.

Q. (By Mr. IRVING.) And after the boats quit landing there—you put them out of business—did they offer to sell it?

A. Yes, after we put them out of business.

Q. How much did they offer?

A. I believe twelve thousand, I can't remember.

Q. As a citizen of Douglas traveling between Douglas and Juneau what fare did you pay prior to the running of the Island Ferry Company?

A. Twenty-five cents each way. [40]

Mr. COBB.—I wish—

The COURT.—I don't see how that bears.

Argument by counsel for the plaintiff.

The COURT.—But your rights don't depend on that.

(Testimony of Henry Brie.)

Mr. IRVING.—Well it depends on this element.

The COURT.—Well, how far do you want to go—all right you may answer that question.

Q. (By Mr. IRVING.) Now, prior to the time of the operation of the Independent Ferry company what did you pay?

A. Twenty-five cents each way.

Q. And now since the ferry company, the Island Ferry Company, has commenced operation?

A. Fifteen cents each way.

Q. What is the cause of the reduction?

A. Ten cents each way.

Mr. COBB.—We object.

Mr. IRVING.—That is all.

Q. (By Mr. COBB.) During these times there wasn't half the travel there is in the last current year, was there? A. During what time?

Q. During the times you paid this twenty-five cents? A. Wasn't half the travel?

Q. During the past year?

A. I think there was more travel than now.

Q. Five years, more travel than there is now?

A. I am not talking about five—two, three.

Q. As a matter of fact the business has increased within the last two years?

A. Three years. There was more travel then than there is today.

Mr. COBB.—That is all. [41]

**[Testimony of L. H. Keist, for Plaintiffs.]**

L. H. KEIST, being first duly sworn, testifies on behalf of plaintiffs, as follows:

Direct examination by Mr. IRVING.

Q. Your name, if you please?      A. L. H. Keist.

Q. Where do you live?      A. In Douglas.

Q. How long have you lived in Douglas, Mr. Keist?

A. About fourteen years.

Q. Were you ever a member of the Council of the Town of Douglas?      A. Yes, sir.

Q. Do you remember when this float was built on the north side of the city wharf?      A. Yes, sir.

Q. What for?      A. For an opposition ferry.

Q. For an opposition ferry?      A. Yes, sir.

Q. And do you know the dock, the float that is built on the south side of the float?      A. Yes, sir.

Q. What was that built for?

A. That was built for general public.

Q. Built for the general public. And do you know as to whether or not the Juneau Ferry and Navigation Company have a dock and float of their own over there?      A. Yes, sir.

Q. What condition, if you know, is this north side float in at the present time?

A. Not in very good condition.

Q. Very poor condition?

A. Very poor condition at present.

Q. How long has it been in poor condition?

A. Quite a little while; ever since it has been put there hasn't been very good.

(Testimony of L. H. Keist.)

Q. Has any ferry-boat landed at that wharf until the time the Island Ferry Company commenced to operate, generally?     A. No, not to my knowledge.

Q. Not to your knowledge. Has the Juneau Ferry and Navigation Company ever used that northside float of the city dock [42] generally?

A. They may have landed there a few times, I don't know.

Q. Not as a general thing?

A. Not as a general thing.

Q. Where have they landed generally?

A. At their own dock.

Q. Where is that?

A. It goes up D Street I think.

Q. On D Street?     A. Yes, sir.

Q. Connected with the dock of the Juneau Ferry and Navigation Company at Douglas?

A. Yes, sir.

Cross-examination by Mr. COBB.

Q. Mr. Keist, the time this was built you say it was built for an opposition ferry, you mean to induce another ferry to come?

A. Yes, sir, that is what the idea was.

Q. For the public benefit of the town so as to get up competition?

A. Yes, sir.

Q. And thereby, by competition cut down rates, and so on?     A. That is the way I understood it.

Q. That was about two years ago?

A. Oh, it has been longer than that.

Q. Four years I should say, about four years?



(Testimony of L. H. Keist.)

A. About that long.

Q. And no other ferry company was induced to come in notwithstanding the public landed until this present year, is that right?

A. Well there wasn't any boats allowed to lay—

Q. How is that?

A. There wasn't any boats allowed to lay at that outside dock, didn't allow them—

Q. At the ferry landing? A. Sir?

Q. The north dock, the north float?

A. There wasn't anybody allowed to tie boats, anybody could [43] come up and get off if they wanted to.

Q. On the south side, that was the dock for the small boats to tie up at? A. Yes, sir.

Q. That wasn't convenient for ferry purposes on account of having to go around the island?

A. Yes, not quite so convenient as the north side.

Q. Not practical for that purpose for that reason—loss of time?

A. Generally, benefit of all the small boats.

Q. But not particularly for ferries? A. No.

Q. Not adapted for that purpose, as I understand you?

A. Well, it is a good place to land at, little further.

Q. Have to run nearly round the island to get in there? A. (No answer.)

Q. (By Mr. IRVING.) That is the only inconvenience the ferry would suffer?

A. That is all I know of.

Q. Better float to land at? A. Yes.

(Testimony of L. H. Keist.)

Q. (By the COURT.) Now, when was the float on the north side built?

A. I don't know whether it was in 1910 or 1911.

Q. And when did the independent Island Ferry go in, the plaintiff in this suit, begin using that dock—when did they begin to use it?

A. I believe they began using—running in August; I am not on the present Council; I don't know anything about the lease.

Q. August of nineteen—of what year?

A. Of this year.

Q. Of this year. Well, now then, from the time that was built until the time the Island Ferry Company commenced using it, [44] what use did the city make of the float on the north side?

A. I don't think they got any benefit—

Q. No, but what use did they—

A. Anyone could land there, I guess, go up on the dock—

Q. Public float, if anybody wanted to land there, but nobody—no boats were allowed to lie there; is that what you mean? A. Yes, sir.

The COURT.—All right. That is all.

**[Testimony of R. R. Hubbard, for Plaintiff.]**

R. R. HUBBARD, being first duly sworn, testified on behalf of plaintiff, as follows:

(Questions by Mr. IRVING.)

Q. Your name, please? A. R. R. Hubbard.

Q. Are you the clerk of the town council of the town of Douglas? A. Yes, sir.

(Testimony of R. R. Hubbard.)

Q. Were you such clerk in October and November of this year?

A. Well, I got a leave of absence from the fifteenth of October to second of November.

Q. But you were clerk all the time, weren't you?

A. I was, Mr. Sorby was acting for me.

Q. You were clerk but not acting?

A. Yes, sir.

Q. Who acted in your place? A. Nels Sorby.

Q. Is that the records of the minutes of the Common Council of the town of Douglas?

A. Yes, sir.

Q. Will you open it to the meeting of November 1, 1915? A. Last meeting that date?

Q. Last meeting that date. A. Yes, sir.

Mr. COBBS.—Let's see it.

Q. (By Mr. IRVING.) What date was that meeting? A. November first.

Q. Will you read to the Court anything that may be in those [45] minutes regarding lease—renting of a certain float by the council:

A. It says: "Motion made and seconded that the north float Douglas City wharf be leased to the Island Ferry Company for one year at a rental of twenty-five dollars per month payable in advance. Motion carried.

Mr. IRVING.—That is all.

The COURT.—What page is that, Mr. Hubbard?

A. On page nineteen.

Q. And what is the title of it?

A. Minutes, regular meeting.

(Testimony of R. R. Hubbard.)

Q. That is the Minute Book?

A. Yes, sir, Minute Book.

Mr. IRVING.—That is all, if the Court please.

The COURT.—Any question?

Mr. COBB.—No.

The COURT.—That is all.

(Adjournment until 4 P. M., November 23, 1915.)

(4 P. M. Tuesday, November 23, 1915.) [46]

(4 P. M. November 23, 1915.)

**[Testimony of Nels Sorby, for Plaintiffs.]**

NELS SORBY, being first duly sworn, testified on behalf of plaintiffs as follows:

Direct Examination by Mr. IRVING.

Q. Your name?      A. Nels Sorby.

Q. Were you a resident of the City of Douglas during the month of November last?

A. Yes, sir.

Q. What were you doing in Douglas at that time?

A. I was city clerk.

Q. You were city clerk, pro tem, for the time being?      A. I was appointed by the Council.

Q. Yes?

A. During Mr. Hubbard's absence in Seattle.

Q. Were you present at a Council meeting at the Town Council of Douglas on the night of November first?      A. I was.

Q. Yes. In what capacity?      A. City clerk.

Q. Will you kindly state to the Court if there was an ordinance—a resolution or ordinance gotten up and passed by the Council at that time regarding any float over there?      A. There was.

(Testimony of Nels Sorby.)

Q. Tell the Court about it.

Mr. COBB.—Going to prove the ordinance?

Mr. IRVING.—Not prove the ordinance, put on witness about the ordinance—the book, going to prove its passage by—

A. The record itself shows it passed.

The COURT.—How many members present at the meeting? A. All the members were present.

Q. How many is that? A. Seven.

Q. Seven, how many voted for the ordinance?

A. Six voted for leasing to the Island Ferry Company.

Mr. IRVING.—That is all. Just a moment. Who voted against it?—if you know? [47]

Mr. COBB.—Object to that as irrelevant.

Mr. IRVING.—All right, that is all.

**[Testimony of C. P. Morgan, for Plaintiffs.]**

C. P. MORGAN, being first duly sworn, on behalf of plaintiffs, testified as follows:

Direct Examination by Mr. IRVING.

Mr. IRVING.—Just before I go on to offer any interrogatories to Mr. Morgan, if your Honor please, in connection with the testimony Sorby I want to read to the Court Exhibit “B” of the pleadings in this case, which is made a part of the plaintiffs’—(Reading.)

Q. Mr. Morgan, what is your name?

A. C. P. Morgan.

Q. Are you one of the plaintiffs in this action?

A. I am, yes, sir.

Q. What is the name of your concern?



(Testimony of C. P. Morgan.)

A. The Island Ferry Company.

Q. What is your business?

A. Our business is conducting a ferry between Juneau and Douglas and Thane on Gastineau Channel.

Q. What is the name of your ferry, present ferry?

A. Our present ferry is the "Gent."

Q. How long have you been in the Island Ferry Company?

A. Since the 4th of August, 1915. [48]

Q. Mr. Morgan, how are you operating, so far as the landing at that float is concerned?

Q. How are we operating? A. Yes.

A. In so far as the town is concerned—

The COURT.—I would rather hear for it is more to the point, how you are interfered with by these people landing there yourself, how does it affect your business?

Mr. IRVING.—Tell the Court.

A. We operate on a regular advertised schedule, sailing from Juneau at certain hours, sailing from the North float at Douglas at certain hours. The Juneau ferry have been operating the boat "Alma" for some time sailing from their own float in Juneau at certain hours and from their own float in Douglas at certain hours. As the business of the Island Ferry Company increased the Juneau Ferry and Navigation Company put in commission the gas-boat "Teddy," the gas-boat "Teddy" since her recent being in commission has been operating from their own float in Juneau to their float in Douglas

(Testimony of C. P. Morgan.)

and to the North float, which we use in Douglas, without an advertised schedule. It is apparent to us that the intention of the Juneau Ferry and Navigation Company—

Mr. COBB.—I shall object.

Mr. IRVING.—Tell what they did.

A. The Juneau Ferry and Navigation Company run the gas-boat “Teddy” from that without an advertised schedule and as a rule it arrived at that float, lay *at until* we, our approach was imminent, left just before our arrival; that is the action of the “Teddy.”

Q. And what would they do just prior to their leaving and [49] prior to your landing on float?

A. On arrival they blew numerous, very numerous whistles of various kinds.

Q. Did they blow your whistle?

A. We have a rule two whistles five minutes but the “Teddy” has been continuously blowing two whistles up to the moment of their departure, frequent whistle.

Q. When would they leave the float. Tell the Court all about that.

A. They have stayed at the float on one or two occasions until we were within one or two feet of it; as a rule leave before our arrival, few minutes before.

Q. Whether or not you know, as to whether or not the blowing of the whistle on landing at that float injured you and deceived the people thinking they were taking the “Gent”?

(Testimony of C. P. Morgan.)

A. It deceived the people. I have been advised directly by various people.

Mr. COBB.—I shall object to hearsay.

Mr. IRVING.—Yes.

The COURT.—Anything you know about it, tell us anything you know.

A. I have seen people coming down the dock when I have been on the “Gent,” I seen people stand on the Main Street of Douglas on hearing the two whistles of the “Teddy” hurry down and go aboard her.

Q. What was the fare between Douglas and Juneau and Juneau and Douglas up to the time that you commenced operating this independent ferry?

A. Twenty-five cents each way.

Q. What is it now?

A. Fifteen cents each way.

Q. Who lowered the fare?

A. The Island Ferry Company, its predecessor, the “Rex.” [50]

Q. You say when you started the boat you lowered the fare to fifteen cents?

A. Lowered the fare to fifteen cents.

Q. State whether it has been since that time.

A. It has been since the first day the “Rex” started.

Mr. IRVING.—That is all.

The COURT.—This lease you say, is that the lease that has been attached to this complaint?

A. Beg pardon?

Q. Is that the lease that is in controversy, at-

(Testimony of C. P. Morgan.)

tached to the complaint?

A. That is the lease.

The COURT.—Cross-examine.

Cross-examination by Mr. COBB.

Q. The “Teddy” never interfered with your landing?

A. The “Teddy” did interfere with our landing.

Q. What’s that?

A. Yes, interfered with our landing.

Q. In what way?

A. She stayed at the float so long, with the tide running under the float, that we missed our landing.

Q. When was that?

A. On one occasion, I can’t state the date.

Q. Just one occasion?

A. On one particular occasion.

Q. Any other occasion?

A. Not as close as that; as a rule, I stated, she got away several minutes before our arrival.

Q. Just on one occasion then, it interfered with your landing—how much?

A. So much that we missed our landing. [51]

Q. Missed on account of the low tide?

A. On account of the full tide, the run of the tide, on account of the current, a tide running under the float.

Q. Now, Mr. Morgan, did you ever land at the south float? A. Yes.

Q. You continued to use that float—

A. Why did we continue to use that float—

Q. Yes.

(Testimony of C. P. Morgan.)

A. The north float is the float that the "Rex" started at. We have accustomed our passengers to go to the north float to take the ferry.

Q. Well, how far apart are the gangways, between the two floats?

A. Distance probably forty feet.

Q. Is that the only reason?

A. No, that is not the only reason.

Q. Tell the Court what the real reason is?

A. I told the Court what the real reason was. There is another reason.

Q. What? A. It is further around.

Q. Great deal further around?

A. Yes, probably five minutes more.

Q. Take that much more time and more gasoline?

A. Yes.

Q. Isn't there still another reason—at low tide, very low tides you can't get in and out that south float? A. That is a fact.

Q. Yes. Was that part of the time during the day you could not make—

A. Did you say north or south?

Q. South.

A. We haven't any tide when you couldn't get into the south float; we know of no time you can't get into the south [52] float, if such a low tide occurs we haven't seen it.

Q. From how long was this "Reck" boat run?

A. This what?

Q. This "Reck," your predecessor, the ferry before you? A. The "Reck"?



(Testimony of C. P. Morgan.)

Q. The "Rex," or whatever you call it. How long did it run?

A. It commenced to run the latter part of June and run through July.

Q. And it landed at the north float?

A. Landed at the north float.

Q. Now, as a matter of fact the "Tillicum" goes to that float? A. She used to.

The COURT.—Who used to?

Mr. COBB.—"Tillicum," another boat.

A. Their calls were infrequent, she touched there.

Q. (By Mr. COBB.) Whenever she had business? A. She touched there infrequently.

Q. She was a gas-boat plying for hire in the waters here? A. Yes.

Q. Small gas-boat "St. Nicholas" used it?

A. She touched a few times this summer.

Q. She is a small gas-boat plying here on inside waters? A. Yes.

Q. Used it whenever she had occasion, business there?

Mr. IRVING.—I submit this is irrelevant, if your Honor please. We admit—

The COURT.—What time are you referring to?

Mr. COBB.—Up to the time of this lease.

Mr. IRVING.—Before or since?

The COURT.—He says before the lease was given. The object, of course, is to show the public need of the float?

Mr. IRVING.—Yes.

The COURT.—Up to that time. [53]

(Testimony of C. P. Morgan.)

Q. (By Mr. COBB.) They used it, didn't they?

A. At times, infrequently.

Q. The "Hague" also used it?

A. I don't think I have seen the "Hague" use it.

Q. You don't know about that?

A. I think I have never seen the "Hague" use it.

Q. What other boats have you seen there?

A. I think the boats that have touched there have been very infrequent.

Q. Did you see Mr. O'Connor's boat there?

A. Yes, I have seen Mr. O'Connor's boat there.

Q. Bartello's boat?

A. No, I don't remember Bartello's boat.

Q. As a matter of fact you can't recall all the boats you have seen there, can you?

A. I have seen very few boats there, hasn't been generally used.

Q. Can you recall all the boats you have seen there? A. No, I can't.

Q. Now, when did the "Teddy" begin taking on and discharging passengers there?

A. What date?

Q. Yes.

A. I am unable to state without looking at my records the date she started running.

Q. It was at least a month before you made that lease, wasn't it?

A. I don't believe it was a month, I cannot tell without looking.

Q. Some time—

A. It was some time before the lease was made.

(Testimony of C. P. Morgan.)

Q. And they gave the regular service on their run, channel ports here, to that float?

A. Might have been called regular, yes. [54]

Q. Before you leased it? How long have you resided in Juneau? A. Since last spring.

Q. You didn't reside here then during the past years, four or five years?

A. My first residence was last spring.

Q. Only since last spring. When was this occasion that you refer to that you were interfered with at this one landing on account of the current?

A. On account of the "Teddy." We missed the landing on account of the "Teddy."

Q. You say the "Teddy" lay there until the current was so strong you couldn't land?

A. The "Teddy" lay there until we come so close that we missed the landing. You understand there is a current flows under that float and a boat approach must carry speed in order to make the float.

Q. When was that? A. I can't state the date.

Q. About the first of the month? A. Yes.

Q. Before you leased it then?

A. Before it was leased.

Q. What did you do with your passengers that you had aboard on that occasion?

A. We made another landing.

Q. Why? Just explain to the Court what you mean by that. I don't understand. Did you take the passengers back to Juneau?

A. I say we made another landing at that float.

Q. How long did that take you?

(Testimony of C. P. Morgan.)

A. A few minutes.

Mr. COBB.—So you were just discommoded a few minutes on account of the current. That is all. [55]

Q. (By Mr. IRVING.) How long have you been a resident of Alaska, Mr. Morgan?

A. Since 1898.

Q. But of this particular part?

A. Since last spring.

Q. Mr. Cobb asked the reasons why you landed at the north float instead of at the south float. Now, I will ask you is it more convenient for a ferry starting from Juneau to land at the float operated by the Juneau Ferry and Navigation Company than it would be to land at the float that is now under lease to you from the city of Douglas?

Mr. COBB.—I object, irrelevant and immaterial.

Mr. IRVING.—He has laid great stress on the fact we have to run around the island. He has shown it would take five minutes longer, at greater expense. Now, I want to show by this testimony that their own float, which is in good repair, splendid position, is much nearer to the town of Juneau than the north float.

The COURT.—Well, he may answer that question.

A. The float of the Juneau Ferry and Navigation Company that they have been regularly using is probably three hundred yards nearer the town of Juneau, in order to make a landing at the other float, approximately, three minutes are consumed.

Q. That is, it would consume three minutes more

(Testimony of C. P. Morgan.)

time for the ferry to land at your float than at the Juneau Ferry and Navigation Company's float that they own?     A. Approximately.

Q. Will you state to his Honor the location of these two floats as being a public convenience to the public generally of Douglas, if you know?

A. The approaches—

Q. That is, I mean, now, get me; the float of the Juneau Ferry & Navigation Company and the float under lease to you by [56] the town of Douglas?

A. The approach to the two floats—the approaches to the Juneau float and to the float now under lease to the Island Ferry Company reach up to the Main Street of the town and tap the town at its business center.

Q. Now, for the purpose of giving the Court the identical location, this float that is at the end of the Juneau dock, that leads up past whose store when you get up on to Main Street.

A. Elmer Smith's drugstore has been on the corner, store.

Q. Just to bring it home to His Honor. And then if they land at this north float that you have under lease, passengers, they come on up about what place?

A. Martin's, and the Ohpheum Theater, picture show.

Mr. IRVING.—Your Honor gets the location of the two floats?

The COURT.—Yes, I know.

Q. (By Mr. IRVING.) Very well. Is there at low tide—at all stages of the tide—you say you have



(Testimony of C. P. Morgan.)

grounded at this north float?

A. Very many times I have gone aground with the small boat "Rex," drew not to exceed two feet of water.

Q. And you have also stated that the float is grounded?

A. I have seen the float aground high and dry.

Q. Do you know the conditions of the water at the float of the Juneau Ferry and Navigation Company's float at low tide?

A. I have seen the "Alma" laying there at all stages of tide without trouble.

Q. Without trouble?      A. Without trouble.

Q. Whether or not, if you know, could the "Alma" have landed at the north float at the same stage of water?      A. She could not. [57]

Q. Whether or not the "Teddy" could have landed at the north float?

A. I have seen the time when the "Teddy" could not get her gangway to that float; we have been unable to get the gangway of the "Gent" there; we have been aground there very many times with the "Gent"; the bottom is sloping, it is not precipitous.

Mr. IRVING.—That is all, Mr. Morgan.

Q. (By Mr. COBB.) Paid the rent?

A. The rent was paid in advance.

Q. Paid the rent on the float?

A. It was, I have every receipt.

Q. (By Mr. IRVING.) Have you ever paid anything on this lease?

(Testimony of C. P. Morgan.)

A. First month's rent when it was due, have the receipt.

Mr. IRVING.—That is all.

Mr. COBB.—That is all.

**[Testimony of B. D. Blakeslee, for Plaintiffs.]**

B. D. BLAKESLEE, being first duly sworn, testifies on behalf of the plaintiffs, as follows:

Direct Examination by Mr. IRVING.

Q. Your name, please? A. B. D. Blakeslee.

Q. Where are you residing now? A. Juneau.

Q. Where? A. Juneau.

Q. Where are you working?

A. I am repairing the wharf over on the Island for the City of Douglas.

Q. Do you know the location of the float on the north side of the city dock? A. Yes, sir, I do.

Q. Will you kindly state to the Court—did you know of that float in the month of November?

A. Yes.

Q. The first of November?

A. Along about then, I think.

Q. What condition, what is the physical condition of that float in so far as its commercial value at this time [58] and first of November?

A. I don't think it amounted to much, inasmuch as the logs it is built on are water-logged and it is washed if there is any sea at all, making it impossible for people to get on. Yesterday particularly we noticed it was impossible for a person to get on and off.

(Testimony of B. D. Blakeslee.)

Q. What is the condition of the logs underneath as to rottenness?

A. I tested one to-day with the expectation of taking it out and found it quite rotten.

Q. Found it quite rotten. You have been in this class of business some time, have you, Mr. Blakeslee?

A. Yes, I have been in all classes of repair work.

Q. Then your opinion as acquainted with this class of work—would you say that float on the first of November when leased was in fit condition for general commercial use?

A. No, it only could be used to advantage during the calm times.

Mr. IRVING.—That is all.

Cross-examination by Mr. COBB.

Q. (By Mr. COBB.) From its situation, with storm blowing, it is difficult to get in—

A. If it was built up higher they would have better opportunity of getting in, but the way it is now it is right almost level with the water, not over about seven inches; I measured to-day.

Q. Only about seven inches?

A. Yes, at the low part.

Q. That is due to its being water-logged, the conditions you speak of, when water is washing over when a storm is [59] blowing?

A. Whenever there is a sea on it gets awash.

Mr. COBB.—That is all.

Q. (By Mr. IRVING.) Mr. Blakeslee, if this float were detached, this particular landing, that gang-

(Testimony of B. D. Blakeslee.)

way, if it were detached from the dock and standing outside by itself, a man needing a float and knowing the condition of this float, would you pay anything for it, provided you needed a float?

A. I don't think I would.

Q. Don't think you would. Now, as a man experienced in this line of work, would you say that, from the condition of this float as you find it now you are about to repair it, that there has been anything done to the float for a long period of time in the way of repairs?

A. No, I should say not, as the timbers are covered with slickers and barnacles, looks as if it had been that way for a long while.

Q. And do you know anything about the leasing of this float to the Island Ferry Company?

A. No, sir, I do not know. I heard it had been leased, but I don't—

Q. You don't know anything about it yourself?

A. No, sir.

Q. Did you receive the notification of the street committee of Douglas to repair this float since November first, before or after, since November first?

A. It was spoken of when I first went over there along the middle of October, but there has been nothing done about it up until after; started this morning.

Mr. IRVING.—This morning. That is all. [60]

Q. (By Mr. COBB.) The street committee?

A. Wharf committee, I have—

(Testimony of B. D. Blakeslee.)

Q. Wharf committee had it done. When, if you know? October?

A. Along in October, when I returned from the Mendenhall bridge contract.

Q. And directed it be put in order?

A. Yes, the wharf, the piling—

Q. The whole wharf? A. Yes.

Q. Or just this wharf?

A. The wharf generally required repairing.

Q. Oh, yes, it was a general job of repairs on the wharf and included—

A. It was understood.

Q. The city of Douglas.

A. Yes, sir, I am working entirely through the city of Douglas.

Mr. COBB.—That is all.

Mr. IRVING.—That is all.

[**Testimony of M. J. O'Connor, for Plaintiffs**  
**(Recalled).]**

M. J. O'CONNOR (Recalled).

Direct Examination by Mr. IRVING.

Q. I don't remember as to whether, when you were on the stand, I asked you these questions; if I did the Court will pardon me. Do you know of your own knowledge as to whether or not the city of Douglas has expended any money in the upkeep of this float leased to the Island Ferry Company?

A. I do, sir.

Q. Tell about that?

A. There has been nothing spent on it, it is in the same condition to-day; of course, it is not quite as



(Testimony of M. J. O'Connor.)

good, but there has been nothing spent on it.

Q. Nothing spent on it; when you say spent on it that is keeping [61] it in repair?

A. Well, it wasn't used a great deal; when you use a dock or a float it requires much more repair than when it isn't used.

Q. There was no ferry landing at it then?

A. No, sir.

Q. If there was a ferry landing there it would have to be in a different condition to-day.

Q. Do you know the condition of it?

A. I do, sir.

Q. What is it? A. Very bad.

Mr. IRVING.—That is all.

Q. (By Mr. COBB.) One or two questions I want to ask Mr. O'Connor I omitted last night—to clear up the matter. Did I understand you to say yesterday that the ferry company, the Juneau Ferry and Navigation Company, tried to prevent you from building a dock?

A. Yes, sir, you understood me if you understood me correctly; that is they didn't go over with a shot-gun or rifle to stop me from building that dock, but Mr. Margrie with tears in his eyes spent an hour in my office trying to induce me—

Q. Is that what you referred to?

A. That is what I referred to.

Q. You didn't mean that they tried to use any improper means?

A. Never gave them occasion to offer me any improper means; I told Mr. Margrie before we had

(Testimony of M. J. O'Connor.)

spoken very long that no power, no corporation nor nothing, or no lot of individuals could prevent me from building that dock, and doing what I thought was best for the people of Douglas.

Q. I just wanted to clear it up; I thought they might have tried to bribe you?

A. Knew better than to offer a bribe to me, Mr. Cobb. [62]

Q. I wanted to clear it up.

A. I will clear it up for you any time; there is no man ever offered me a bribe, not even Mr. Margrie.

Q. Just simply asked you not to build it. Give any reasons why?

A. Mr. Margrie stated that I was, that if I did build the dock that I would waste the taxpayers' money; he pleaded with me to come over to Juneau and look over the books and he could show me where they hadn't made a cent on their ferry dock; I told him that since it wasn't a paying proposition for him he better go home and I would build a dock and take that white elephant off their hands. I did build the dock, Mr. Cobb, and it has saved the people of Douglas thousands of dollars in the reduction in the price of coal; it dropped the wharfage from two dollars to a dollar, and last year it netted the citizens of Douglas a little less than six thousand dollars.

Q. Well, that was good work.

A. I think it was good work, Mr. Cobb; I am proud of it.

Q. Now, then, the situation then prior to the time

(Testimony of M. J. O'Connor.)

that you built this dock, as I understand it, was the Juneau Ferry and Navigation Company had the only dock in the place?

A. Yes, sir, that was a fact.

Q. That was a privately owned dock?

A. Yes, sir.

Q. And had the only float in the place?

A. The only float? No, prior to the building of this city dock Mr. Murray built a dock and also built a float; he no sooner had it built—he built that for the public, intending to use it himself; no sooner had he built that dock than the Juneau Ferry and Navigation Company had it shut up and paid him to keep it shut up, to the detriment of the [63] public.

Q. It wasn't a public float, however?

A. Beg pardon?

Q. You are still getting away from the point I am asking about.

A. I might have; if you give me the point you want brought out I will certainly bring it out.

Q. It was the simple question,—was any other public float in the place? A. Not a public one.

Q. Yes. So that anybody who landed there, wanted to land at Douglas had to use a privately owned float and privately owned dock; that was the situation?

A. That was the situation, sir; they would permit of no other float.

Q. It was to meet that situation that the city of Douglas built its present public dock?

(Testimony of M. J. O'Connor.)

A. It was to break that monopoly that that city dock was built.

Q. Exactly. A. And benefit the people.

Q. And the floats put in also?

A. For the very purpose.

Q. And it accomplished that purpose?

A. It accomplished that purpose, yes, sir.

Mr. COBB.—That is all.

Q. (By Mr. IRVING.) Now, when you say it accomplished its purpose, what was the north side float built for?

A. It was for the purpose it is being used to-day.

Q. And to serve the public?

A. And to serve the public.

Q. What was the south side?

A. For the general public, for a landing place.

Mr. IRVING.—The north side, from your testimony yesterday and to-day, for the specific—

Mr. COBB.—I object to his leading the witness.  
[64]

Q. (By Mr. IRVING.) State what these two floats were built for, giving the Court just the inside of that whole situation in your own language.

A. There was absolutely, Mr. Cobb, no use for the north side float when the south float was built, absolutely; when the south float was built you immediately abandoned your—refused to let the people to put on another and you turned Murray's float over to him; it was useless to Mr. Murray; and to still further the interests of the people of Douglas, I asked Mr. Murray to give me that float after your

(Testimony of M. J. O'Connor.)

company had abandoned it, and he gave it to me and I had that float set up there without a cost to the city of Douglas except setting it up, but there was absolutely no use for it except that it may be an inducement for an independent company to come in and provide a landing for them.

Q. Now, the south float?      A. Beg your pardon?

Q. Tell the Court about the south float.

A. South float was for the general public and it was enlarged to accommodate all the people that could come in there.

Q. And that is what it was built for?

A. It was built for the general public. We first had a float on the north side, we found it wasn't—added about sixty feet, the float is about one hundred feet long.

Mr. IRVING.—That is all.

Q. (By Mr. COBB.) That is for small boats to land at?      A. Anybody.

Q. I say, the small boats; it cannot be used except for small boats, small boats land and lay at—

A. I have seen all manners of boats in there. [65]

Q. You never saw the "City of Seattle" in there?

A. No, no, I haven't. I have seen—I have seen James' towboat in there.

Q. But you never saw any of the big steamers?

A. It wasn't built for the big steamers.

Q. Exactly. It was built for the small boats to land and lay at.

A. Built for anybody that wanted to use it; there has never been a man ordered to leave that float—



(Testimony of M. J. O'Connor.)

they have been invited to come there and stay there; there is a fishery boat laying over there all the fall.

Q. (By Mr. IRVING.) And the "Alma," can the "Alma" land there?

A. The "Alma" could land there.

Q. (By Mr. COBB.) I asked you yesterday and you didn't know; have you refreshed your memory—can you tell us when you built that dock?

A. I think it must have been in 1909; I could not say exactly without making—

Q. You didn't make six thousand dollars in that year?

A. Well, now, I can tell you a whole lot more about that dock if it is going to do you any good; that was an uphill job, building that dock; the city had very little money; I will tell you some things that you and the Court haven't found out about that dock. To begin with—

Q. Only want you to answer my question.

A. I know. You ask me about building that dock.

Q. I ask you if you made any such sum as six thousand dollars.

A. We didn't build the dock the first year, we built it—

Q. The first year after it was built?

A. It has made some money since the very day it was built. [66]

Q. But no such sum as you claim it made last year?

A. No, I don't think it made as much; I think it made four thousand dollars in 1913.

(Testimony of M. J. O'Connor.)

Q. 1913?

A. The records of the city clerk will show what it has made from the date it was built.

Q. Prior to 1912? A. Made money all the time.

Q. As much as four thousand dollars?

A. I could not be positive. I remember last year because I was quitting the council and I was proud of the record we made.

Q. Mr. O'Connor, you can give the Court some idea, if you will, as to the amount it made in 1910 and '11.

A. Probably a few thousand dollars, two or three, I can't say definitely.

Q. Don't you know it didn't make any such sum?

A. I tell you it didn't make any such sum; it has been increasing right along.

Q. Exactly. Can you tell approximately what the dock cost you?

A. No, I can't, probably; it has probably cost twenty thousand dollars up to this time, but it cost very little to begin with, Mr. Cobb; the logs that went into that first approach I was made a present of.

Q. Now, Mr. O'Connor—

A. And I donated them to the city.

Q. From whom did you get the wharf site?

Mr. IRVING.—I object, if your Honor please—who they got it from.

The COURT.—I don't see, Mr. Cobb, myself.

Mr. IRVING.—As far as the wharf site is concerned—

(Testimony of M. J. O'Connor.)

Mr. COBB.—The purpose of it I will state to the Court. This witness can testify as well as anybody else, to show [67] that under the terms they haven't a right to make a lease of any part.

Mr. IRVING.—If your Honor please, the record is the best showing.

The COURT.—Show what?

Mr. COBB.—Show under the terms on which they got it, have no right to—

The COURT.—That is part of your case anyhow. Ask another question.

Mr. COBB.—That is all, I think.

Mr. IRVING.—That is all.

That is all, if your Honor please.

Plaintiff rests.

**[Testimony of Waldo B. States, for Defendant.]**

WALDO B. STATES, being first duly sworn, testified on behalf of defendant, as follows:

Direct Examination by Mr. COBB.

Q. Captain, state your name?

A. Waldo B. States.

Q. Where do you reside, Captain States?

A. Juneau.

Q. What is *occupation*?

A. I am master of the Alma.

Q. Your occupation, then, you are mariner, master's papers?      A. Yes, sir.

Q. How long have you been operating boats in and out the port of Juneau, and Douglas, Gastineau Channel?      A. Oh, About twelve years.

(Testimony of Waldo B. States.)

Q. Are you familiar with the north float of the Douglas City dock?     A. Yes, sir.

Q. How long have you known that float?

A. Ever since it was constructed I think.

Q. Do you know whether or not from the time it was constructed [68] until the present time it was used generally as a public landing place for small boats?

A. Yes, sir, I think it is; I have seen numerous boats tied up and laying there.

Q. Land there yourself?     A. Yes, sir.

Q. How long have you been in the employ of the Juneau Ferry and Navigation Company?

A. Since the 17th day of November, 1908, continuously.

Q. Ever landed there with the ferry before this year?

A. Yes, landed there at the time, for a period of about a week while we were repairing our own float.

Q. Have you had occasion to land there at other times in the course of the business of the ferry?

A. Yes, I have, not very many times, have few times, but I have landed there.

Q. Now, Captain, I want to ask you, to get you to tell the Court in a general way so he will understand it, first, whether there has been any increase in the travel between the Douglas Island ports on the small boats, ferries and small boats here within the last two or three years, and, if so, what has been the extent of that increase, as near as you can—

(Testimony of Waldo B. States.)

Mr. IRVING.—I object, as irrelevant and immaterial.

The COURT.—Overruled.

Q. (By Mr. COBB.) Go ahead and answer.

A. There is no doubt but there has been increase in travel in the last two or three years, and especially this last year.

Q. Can you give some idea as to the volume, whether it is half as much more, twice or three times as much? A. It is more than double. [69]

A. (Continued.) A good deal more than double.

Q. So that it is in order to serve the public now you would have—what has been the increase in the ferry service?

A. Oh, the increase in the ferry service has been from eight trips to sixteen.

Q. And prior to three years ago?

A. Three years ago?

Q. Prior to that time did you make any trips at all to Thane?

A. O, no, well at the time the Nowells had Sheep Creek then.

Q. How is that?

A. At the time the Nowells had Sheep Creek there was two ferries a day, and after they closed down there was no ferry to Sheep Creek. But the last three or last—it has been very near three years we have operated a double crew on the ferry, and that is what the “Alma” was constructed for too.

Mr. IRVING.—I object to this testimony so far as Sheep Creek is concerned, I would like to see be-



(Testimony of Waldo B. States.)

tween Douglas and Juneau.

The COURT.—I think that is going too far.

Mr. COBB.—It is only to put into the record.

The COURT.—Well, it is in the record.

Mr. IRVING.—I move to strike that testimony.

The COURT.—It will stay right where it is.

Q. (By Mr. COBB.) Now, state as near as you can recall what boats you have seen landing at that north side float and using it as a public dock since it has been built; just give as accurate an idea as you can recall.

A. I have seen the “Hague” land there, I have seen the “Fox” land there, the “Tillicum” land there, I have seen the St. Nicholas” land there, I have seen the “Pioneer” land there, and numerous other boats that have come and went; of course the most of the people that come or go in or out of Douglas know that the *ferries going* and coming all the time and they have to watch [70] their chance if they use our float.

Q. Now, Captain, if the south float ferry is convenient for the public ferry boats as the north float touching at that dock?

A. At the City dock?

Mr. IRVING.—Object, if your Honor please.

The COURT.—Well on the theory of Mr. Cobb I believe it is competent—proceed.

Q. (By Mr. COBB.) Just state to the Court what is the difference then in the convenience of the ferry business in using the north float instead of the south float.

(Testimony of Waldo B. States.)

A. O, there is no comparison for the convenience of the two floats to run a ferry business with.

Q. Why?

A. Why, float is inside of the island and half of the time it is blocked with saw logs, would be impossible to run a ferry schedule in and out of and you would have to run around the island you would increase your route half a mile.

Q. Well, then, how is it with regard to the small boats using it to lay at, being crowded frequently with small boats?

A. O, yes, there is lots of small boats tie up and lay there right now.

Q. That, in other words, is the small boat harbor, isn't it?     A. Yes, sir.

Mr. COBB.—That is all.

Cross-examination by Mr. IRVING.

Q. Mr. States, when you were sailing the "Alma" did you land at this north float?     A. I have.

Q. Did you maintain a regular ferry schedule for that float?     A. Yes, sir.

Q. Was it advertised that you would leave the north float of [71] the city dock on the schedule?

A. At the time I landed at the city dock we were repairing our own.

Q. That is it exactly. You never run from the city dock on a schedule?

A. Well, only at that time.

Q. What I mean, Waldo, was generally?

A. No.

Q. The Juneau Ferry and Navigation Company

(Testimony of Waldo B. States.)

used their own float? A. Yes, sir.

Q. And that was a good float? A. Yes.

Q. Good approach, lead right up, the Juneau Ferry and Navigation Company float led right up to Front Street? A. Yes, sir.

Q. And now isn't it a fact, Mr. States, that up to the time that the "Rex" and the "Gent" went on the route, you never did, as a general thing, land at that float at all with any one of your boats?

A. I didn't make a practice of landing.

Q. You didn't advertise to the public?

A. Only at the time we repaired.

Q. Now we grant that, that is granted—when your own float was under repair you landed—

A. That is the only time.

Q. Now, outside of that exception, you never informed the public or advertised, the Juneau Ferry and Navigation Company never advertised it would leave that float on schedule? A. No, sir.

Q. It seems to me that you started an independent ferry yourself, once Mr. States? A. No, sir.

Q. Didn't you contemplate or put a boat on one time between here and Douglas? A. No, sir.

Mr. COBB.—I don't think that is proper cross-examination.

The COURT.—No, it isn't, but he says No, so we can't [72] proceed any further.

Mr. IRVING.—It was just a fault of my memory, I thought Waldo did.

Q. Did you ever land, Waldo, as a general thing did you ever land at the north float, the "Alma"

(Testimony of Waldo B. States.)

since you been sailing, as a general thing?

A. No, not as a general thing.

Q. Did you tell the Court when and how and why you landed at this north float?

A. At the time we repaired, a little over a year ago or sixteen months ago we moved our float out and—

Q. I mean outside of the time of the repairs, Waldo, any time did you land there generally, outside of the times when you were making repairs?

A. No, sir.

Q. No. All right. Now, can you land at the north float, of this boat that is under lease to the Island Ferry Company, could you land there at low tide with the “Alma”?

A. I don’t think I could.

Q. Have you ever grounded there? A. No, sir.

Q. Then you never did land at real low tide?

A. No, I don’t know it was low tide particularly or not, I never noticed, I never was in at extreme low tide.

Q. Now, being an experienced navigator, running between Douglas and Juneau for twelve years, you know of your own knowledge whether you can land with the “Alma” at low tide at that float?

A. I don’t think I could not. No, sir, but then you may be able to land at the float one year and not be able the next.

Q. Why?

A. It is continually filling in.

Q. That is the Treadwell filling in on that beach?

(Testimony of Waldo B. States.)

A. More or less all along there, yes, sir; I don't know whether it is to the Treadwell sand or not, but we had to move our own float out at Douglas on account of the debris coming down.

Q. You state it is more convenient to land at the float on the north side of the city dock than it would be to land at the float on the south side?

A. I considered it, to running a better schedule.

Q. Now, we will take that ferry schedule,—I will ask you isn't it more convenient to run a ferry schedule coming and departing from the Juneau Ferry and Navigation Company float at Douglas between Juneau and Douglas than it would be at the north float of this dock?

A. I would consider it so.

Q. Yes, the time is shorter, isn't it?

A. Yes, sir.

Q. And the equipment and the float itself is better?     A. I think it is, yes, sir.

Q. That is the Juneau Ferry and Navigation Company's float at Douglas is well kept up, and the piles, and the logs underneath are good: is that right?     A. Yes, sir.

Q. Now, is the Juneau Ferry float, that is the deck of the float, is it higher above water than the deck of the float of the Island Ferry Company—

A. It has two feet more free-board, easily.

Q. Which float has the two feet more free board?

A. The Juneau Ferry and Navigation Company's.

Q. That is the one the Juneau Ferry and Navigation Company own and control?     A. Yes, sir.



(Testimony of Waldo B. States.)

Q. Now Waldo, what is the physical condition as you find it, as you know it, as you found it on the date of November first [74] on to now: what has been the condition?

A. I think it is water-logged and sunken down, and the planks are loose on it and in a run-down condition.

Q. Listen. Did it appear to you it had been receiving municipal attention so far as keeping it in repair is concerned?

A. It didn't look it. I put some cleets in it to tie up to at the time I landed there.

Q. Now, just one more question. Did the Juneau Ferry and Navigation Company at any time prior to the time of the entering into the business of ferrying by the Island Ferry Company make any effort or did they ever maintain a regular schedule of ferry service between the north float of the city dock and the city of Juneau? A. No, sir.

Mr. IRVING.—That is all.

Mr. COBB.—That is all.

**[Testimony of Fred Pantermahl, for Defendant.]**

FRED PANTERMAHL, being first duly sworn, testified on behalf of the defendant, as follows:

Direct Examination by Mr. COBB.

Mr. IRVING.—May I ask Mr. States one more question right from where you sit.

Q. When did the cut in the fare go into effect, so far as the Juneau Ferry and Navigation Company is concerned, to fifteen cents?

(Testimony of Fred Pantermahl.)

A. (By Mr. States.) I can't tell you offhand. It was in the neighborhood of three months—

Q. Was it before or after the independent ferry company went into business?

A. Why it was after.

Mr. IRVING.—That is all. [75]

Mr. FRED PANTERMAHL.

Q. (By Mr. COBB.) What is your name?

A. Fred Pantermahl.

Q. Where do you live?      A. Juneau.

Q. How long have you lived there?

A. Last six years.

Q. What is your occupation?

A. Why, I work on ferry-boat.

Q. How long have you worked on it?

A. Since 1910, May, 1910.

Q. What boat are you on now?      A. "Teddy."

Q. How long have you been working on the "Teddy"?

A. Running her for the last two months.

Q. How's that?

A. Running her for the last two months.

Q. Running her for the last two months. As a ferry?      A. As a ferry.

Q. Beginning two months ago what was the run you made?

A. Why we run from Juneau to Douglas.

Q. Landing where?

A. Landing, from Juneau and back to Juneau.

Q. At what dock?

(Testimony of Fred Pantermahl.)

A. Why we landed on the ferry dock and city dock.

Q. Give service at both docks?

A. Give service at both docks, yes, sir.

Q. Got passengers from both docks?

A. Got passengers from both docks.

Q. Landed at both docks?

A. Landed at both docks.

Q. Then returned to Juneau?

Mr. IRVING.—I object to the leading form of the questions.

The COURT.—Yes, change the form.

Q. (By Mr. COBB.) That began about two months ago?

A. About two months ago, the third of October.

Q. How long have you known that dock? [76]

A. Why, ever since I been here, six years.

Q. Now during that time did you know of its being used generally by the small boat public?

A. Yes sir, all small boats in the Channel.

Q. I want you to give the Court a general idea what boats you have seen use it.

A. Why, all kinds of boats, I saw the "Tillicum," and the "Sea Gull"—Aleck Hartowns, I see him laying on the float and loading freight for Tenakee; I see the "Ida," small boat running around the channel; I see the "St. Nicholas" loading freight and passengers, and several others.

Q. Now, on this ferry run that you speak of, some of your passengers found it more convenient to land at the city dock?

(Testimony of Fred Pantermahl.)

Mr. IRVING.—I object to the leading form of the questions, if your Honor please.

Mr. COBB.—I apologize to the Court—simply shows force of a bad example; the gentleman led his witnesses all the way through.

The COURT.—Bad example ought to be avoided, not followed.

Mr. COBB.—I will try and avoid it.

Q. You state that some of your passengers land at this one float and then the other? A. Yes, sir.

Q. How is it with reference to those desiring to use the ferry—

A. Lots of people rather take that float because it is nearer to their homes, especially the Indians,—live down that way, don't want to go through town, rather go down to that float and catch the ferry there, else they have to go through town, it is nearer, convenient for them, that is why we put them off and take them on there.

Q. Now, I want you to state in a general way so the [77] Court will understand it, what has been the increase in the ferry business for the last two or three years over what it was before?

A. Why, it has *been* more than doubled itself I suppose.

Q. When has been the greatest increase?

A. The last two years.

Mr. IRVING.—What is that?

A. Last two years, two or three years.

Q. What? The increase of the ferry service?

Q. (By Mr. COBB.) That increase going on still

(Testimony of Fred Pantermahl.)

all the time apparently?

A. Yes, sir, of course there is more at summer time than in the winter.

Q. But the general business is growing all the time?

A. Growing all the time, yes, sir.

Mr. COBB.—And you say it has more than doubled in the last year.

That is all.

Cross-examination by Mr. IRVING.

Q. How long have you been in the ferry business?

A. Since May, 1910, sir. About five years.

Q. In the employ of the ferry company?

A. In the employ of the ferry company. Yes, sir.

Q. And you say during that time that the ferry business has been on the increase?

A. No, not at that time, only the last three years.

Q. During the last three years?

A. Yes, sir, I have been on a boat when we carried across three people, made seventy-five cents the whole day, and there is lots of time— [78]

Q. Who owned that boat?

A. On the “Lone Fisherman”—the Juneau Ferry Company.

Q. You were working for them, were you, then?

A. Yes, sir.

Q. Hasn't the business increased since the independent ferry went in and the decrease in ferry—

A. I don't think—

Q. Hasn't it decreased? A. No, sir.

Q. You mean to tell the Court that you are carry-



(Testimony of Fred Pantermahl.)

ing as many passengers?

A. We didn't run the "Teddy" at the time.

Q. Didn't run the "Teddy." Now, why did you start the "Teddy," if you know?

A. Two months ago.

Q. What for?

A. Why to take the increase.

Q. To buck the Island Ferry Company?

A. No, sir, to be more convenient for people to get off and on on their wharf.

Q. On and off another wharf? A. Yes, sir.

Q. More particularly for the Indians?

A. Yes, sir, and for other people, too.

Q. Wait a minute, now. You say it was more convenient for the Indians? A. Yes, sir.

Q. Haven't those Indians always lived there—

A. Yes, sir.

Q. —that you know; then why was it if it was more convenient that the Juneau Ferry and Navigation Company didn't run their boats to this float prior to the time of the Island Ferry Company, for the accommodation of the Indians that live down on the beach—why is that?

A. Because they had their own float and the ferry company dock, and another thing, they couldn't land very well with [79] the other boat.

Q. Big boat, and at that time they didn't run the "Teddy"? A. Sometimes we did.

Q. You know now, as a general thing they didn't run the "Teddy"? A. No.

Q. When the "Gent" and "Rex" starting to run

(Testimony of Fred Pantermahl.)

they put the "Teddy" on?     A. Two months ago.

Q. Did you up to prior to two months ago make a landing at this north float, as a general thing, and were you scheduled?

A. No, not as a general thing.

Q. Specific times you have gone?     A. Yes, sir.

Q. Did you ever refuse to land passengers at this float, stating that the float of the Juneau Ferry and Navigation Company was the float you were to land at?

A. When the float was under repairs we used to land on the city float.

Q. Now, wait a minute—that isn't—

Mr. COBB.—Don't understand the question.

Q. (By Mr. IRVING.)—Did you at any time refuse to land anybody at the city float and state you were to land them at the float of the Juneau Ferry and Navigation Company float, that was the float you were supposed to land at under your orders?

A. No, sir, we never refused, but nobody every asked for it because our ferry float was right there.

Q. Now, at the times when your float was not under repair why did you land people at the city float on the north side?

A. Because I suppose the company thought it was right for them to land there.

Q. Because you were under orders to you to land there? [80]

A. I was under orders, I was running the boat.

Q. But up to the time the Island Ferry Company started you were not under orders, isn't that so?

(Testimony of Fred Pantermahl.)

A. Yes, sir.

Q. What is the physical condition of the float on the north side of the city dock as regards repair and being kept up, as against the condition of the float owned in fee and operated by the Juneau Ferry and Navigation Company: which is the better float?

A. The Juneau Ferry and Navigation Company has better float.

Q. Which is the larger?      A. Why the Juneau.

Q. How much free-board has the Juneau got?

A. About a foot and a half, two feet.

Q. How much at north end dock?

A. Eight inches.

Q. You mean to tell me that the Island float has got eight inches or free-board?

A. About eight inches or ten inches, something like that, I didn't measure that.

Q. Isn't it a fact that some of it hasn't any free-board at all?

A. If it is blowing at certain stages the water washes over it.

Q. Listen. At a dead absolute calm isn't it a fact that some it hasn't any free-board at all?

A. That side towards the city, and no boats, no ferry land there.

Q. Now listen, I ask you an absolute simple question: isn't it a fact at a dead calm that there is some of the float at the north side of the city dock-free-board?      A. I answered that question.

Q. What did you say?

A. The upper part, won't wash over when calm,

(Testimony of Fred Pantermahl.)

but at the end of the float towards the city it is right even with— [81]

Q. Right even with the water?     A. Yes, sir.

Q. Now is the outer end, leading towards the *man* city dock?     A. The outer end.

Q. Yes?     A. That is the end.

Q. That is the end you mean; I thought you meant towards the town. Now, in rough weather it is impossible to land at that float at all, in northerly gale?

A. I landed there, sir.

Q. But the float was washed, wasn't it?

A. People could get off, could get off and get on.

Q. Did you consider it safe?

A. Why, I think so, sometimes.

Q. As a man running these boats do you think it is safe to land passengers?

A. Not in a real extreme bad weather it isn't safe.

Q. The slogan of the Juneau Ferry and Navigation Company is "Safety first"?     A. Yes, sir.

Q. And still you landed these passengers at this float when you knew it wasn't safe?

A. We didn't land when it wasn't safe.

Q. When it wasn't safe?     A. No, sir.

Q. That was up to your judgment, wasn't it?

A. No, sir.

Q. Have you ever landed passengers when they got their feet wet?

A. We never landed there when they got their feet wet.

Q. Never landed there when they got their feet wet? Then the float wasn't washed?

(Testimony of Fred Pantermahl.)

A. I told you the end towards the—is washed but the other is about eight or ten inches above water.

Q. Have you ever seen it when it was all washed?

A. I have saw it. [82]

Q. Have you ever landed there on those occasions?

A. No, sir.

Q. Did you then run around to the south side and land them?

A. We did, so did the Island Company.

Q. I will admit that we did go to the south float, but I am talking—did you run around to the south float and land them, on the “Teddy”?

A. Yes, sir.

Q. Could you have landed on your own float?

A. Why, sometimes.

Q. Why didn’t you land them there ragher than to go around there—or the “Teddy” is too small?

A. Liable to break up.

Q. Then it is more convenient to land at the float on the south side than it is on your own after you go as far as this north float next to the city dock?

A. Certain winds, strong winds, it would be. We landed that way.

Q. Were you operating as an agent of the Juneau Ferry and Navigation Company prior to the time of the “Gent” going into business? A. Yes, sir.

Q. What was the fare between Douglas and Juneau? A. Twenty-five cents.

Q. Do you remember when that fare was lowered?

A. Yes, sir.

Q. When was that, about?



(Testimony of Fred Pantermahl.)

Q. When the "Rex" started in to run.

Q. Who lowered the *far*, the "Rex" or the Juneau Ferry and Navigation Company?

A. The "Rex" I suppose.

Q. The "Rex" did?      A. Yes.

Q. You know that to be a fact, don't you?

A. Yes, sir.

Q. Oh, pardon me, here is just one more; was there any notice [83] ever served on you by the city of Douglas, by its marshal, for you to stop landing at that float?      A. Yes, sir.

Q. Signed by Mr. Shafer?

A. Signed by Mr. Shafer.

Q. Do you remember about the time when that was?

A. About the first of November, somewhere around there I guess.

Mr. IRVING.—That is all.

Mr. COBB.—That is all.

Defendant rests.

Mr. IRVING.—I don't see any reason for rebutting. [84]

**[Order Allowing Bill of Exceptions, etc.]**

And the above and foregoing oral testimony, together with the verified complaint of the plaintiffs and the answer to the rule to show cause, was all the testimony and evidence before the Court on the hearing and trial of said motion.

And because the above and foregoing matters do not appear of record, I, Robert W. Jennings, the Judge before whom said motion was heard, do hereby

certify and allow the above and foregoing bill of exceptions and order the same made a part of the record herein.

Done in open court this 21st day of December 1915.

ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska,  
First Division. Dec. 21, 1915. J. W. Bell, Clerk.  
By L. E. Spray, Deputy. [85]

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*In the District Court for the Territory of Alaska,  
Division Number One, at Juneau*

No. 1392-A.

C. P. MORGAN, R. B. COCHRAN and H. JOHAN-  
SON, Copartners, Doing Business Under the  
Name and Style of the ISLAND FERRY  
COMPANY,

Plaintiffs,

vs.

JUNEAU FERRY & NAVIGATION COMPANY,  
a Corporation,

Defendants.

**Assignment of Errors.**

Now comes the Juneau Ferry & Navigation Company, a corporation, appellant, and assigns the following errors committed by the Court on the trial and the rendition of the order granting a temporary injunction against the appellant in the above-entitled and numbered cause, upon which it will rely in the Appellate Court:

## I.

The Court erred in granting the temporary injunction prayed for for the reason that the evidence conclusively showed that the float or dock mentioned in the complaint and restraining order was a public dock, acquired by the city of Douglas for public purposes, that the same had been used for public purposes for several years past and that the Common Council of the city of Douglas was without power to grant and convey an exclusive lease thereof to the plaintiffs.

## II.

The evidence conclusively showed that the plaintiffs and appellees had no lease to the float and dock mentioned in the complaint and were not entitled [86] to the exclusive use thereof.

And for said errors the appellant prays that the said order granting the said temporary injunction be reversed and he cause remanded for such other and further proceedings as the said Appellate Court may deem proper.

J. H. COBB,

Attorney for Juneau Ferry & Navigation Company,  
Appellant.

Filed in the District, District of Alaska, First Division, Dec. 17, 1915. J. W. Bell, Clerk. By L. E. Spray, Deputy. [87]

*In the District Court for the Territory of Alaska,  
Division Number One, at Juneau.*

No. 1392-A.

C. P. MORGAN, R. B. COCHRAN and H. JOHAN-  
SON, Copartners, Doing Business Under the  
Name and Style of the ISLAND FERRY  
COMPANY,

Plaintiffs,

vs.

JUNEAU FERRY & NAVIGATION COMPANY,  
a Corporation,

Defendants.

**Petition for Allowance of Appeal.**

The Juneau Ferry & Navigation Company deeming  
itself aggrieved by the order of the Court granting  
an injunction pending the trial of this suit, made on  
the 14th day of December, 1915, hereby petitions the  
Court for the allowance of an appeal from said order  
to the Honorable the United States Circuit Court of  
Appeals for the Ninth Circuit.

J. H. COBB,

Attorney for Defendant.

Filed in the District Court, District of Alaska,  
First Division, Dec. 18, 1915. J. W. Bell, Clerk.  
By —————, Deputy. [88]

*In the District Court for the Territory of Alaska,  
Division Number One, at Juneau.*

No. 1392-A.

C. P. MORGAN, R. B. COCHRAN and H. JOHAN-  
SON, Copartners, Doing Business Under the  
Name and Style of the ISLAND FERRY  
COMPANY,

Plaintiffs,

vs.

JUNEAU FERRY & NAVIGATION COMPANY,  
a Corporation,

Defendants.

**Order Allowing Appeal.**

Upon the petition of the Juneau Ferry & Naviga-  
tion Company,

IT IS ORDERED that an appeal from the order  
or the Court granting a temporary injunction herein,  
made on the 14th day of December, 1915, be and the  
same is hereby allowed, to the Honorable the United  
States Circuit Court of Appeals for the Ninth Cir-  
cuit.

Dated this 18th day of December, 1915.

ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska,  
First Division, Dec. 18, 1915. J. W. Bell, Clerk.  
By ———, Deputy. [89]



*In the District Court for the Territory of Alaska,  
Division Number One, at Juneau.*

No. 1392-A.

C. P. MORGAN, R. B. COCHRAN and H. JOHAN-  
SON, Copartners, Doing Business Under the  
Name and Style of the ISLAND FERRY  
COMPANY,

Plaintiffs,

vs.

JUNEAU FERRY & NAVIGATION COMPANY,  
a Corporation,

Defendants.

**Citation on Appeal.**

United States of America,—ss.

The President of the United States to C. P. Morgan,  
R. B. Cochran and H. Johansen, copartners, do-  
ing business under the name and style of the  
Island Ferry Company, and to Messrs. Irving  
and Milwee, their attorneys, Greeting:

You are hereby cited and admonished to be and  
appear in the United States Circuit Court of Appeals  
for the Ninth Circuit to be holden in the city of San  
Francisco, State of California, within thirty days  
from the date of this writ, pursuant to an appeal  
filed in the clerk's office of the District Court for  
Alaska, Division Number One, in a case wherein the  
Juneau Ferry & Navigation Company is appellant  
and you are appellees, then and there to show cause,  
if any there be, why the order in said appeal men-  
tioned should not be corrected and speedy justice

done to the parties in that behalf.

WITNESS the Honorable DOUGLAS WHITE,  
Chief Justice of the United States this the 18th day  
of December, 1915.

ROBERT W. JENNINGS,  
Judge.

Attest: J. W. BELL,

Clerk. [90]

Service of the above and foregoing Citation ad-  
mitted this the 18 day of December, 1915.

GEORGE IRVING,  
Attorney for Appellees.

Filed in the District Court, District of Alaska,  
First Division, Dec. 18, 1915. J. W. Bell, Clerk.  
By —————, Deputy. [91]

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*In the District Court for the Territory of Alaska,  
Division Number One, at Juneau.*

No. 1392-A.

O. P. MORGAN et al.,

Plaintiffs,

vs.

JUNEAU FERRY & NAVIGATION COMPANY,  
a Corporation,

Defendant.

**Praeipie for Transcript of Record.**

The clerk will please make up a transcript of the  
record in the above-entitled and numbered cause and  
include therein the following papers, to wit:

102    *Juneau Ferry and Navigation Company*

1. Complaint.
2. Rule to Show Cause.
3. Answer to Rule to Show Cause.
4. Order Granting Temporary Injunction.
5. Bill of Exceptions.
6. Assignments of Error.
7. Petition for Appeal.
8. Order Allowing Appeal.
9. Citation.
10. This Praecipe.

This transcript to be made up in accordance with the rules for the United States Circuit Court of Appeals for the Ninth Circuit and the rules of this Court.

J. H. COBB,

Attorney for Juneau Ferry & Navigation Company.

Filed in the District Court, District of Alaska, First Division, Dec. 22, 1915. J. W. Bell, Clerk.  
By L. E. Spray, Deputy. [92]

[**Certificate of Clerk U. S. District Court to  
Transcript of Record.**]

*In the District Court for the District of Alaska,  
Division Number One, at Juneau.*

Case No. 1392-A.

C. P. MORGAN and R. B. COCHRAN and H.  
JOHANSEN, Copartners, Doing Business  
Under the Name and Style of the ISLAND  
FERRY COMPANY,

Plaintiffs,

vs.

JUNEAU FERRY and NAVIGATION COM-  
PANY, a Corporation,

Defendant.

United States of America,  
Territory of Alaska,—ss.

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division Number One, hereby certify that the foregoing and hereto annexed 92 pages of typewritten matter, numbered from 1 to 92 both inclusive, constitute a full, true and correct copy of the record, and the whole thereof, as per the praecipe of the plaintiff in error, on file herein and made a part hereof, in the cause wherein the Juneau Ferry and Navigation Company, a corporation, is plaintiff in error, and C. P. Morgan and R. B. Cochran and H. Johansen, copartners, doing business under the name and style of the Island Ferry Company, are defendants in error, No. 1392-A, as the same appears of record and on file in my office, and that the said

record is by virtue of the Appeal and Citation issued in this cause and the return thereof in accordance therewith.

I do further certify that this transcript was prepared by me in my office, and the cost of preparation, examination, and certificate, amounting to \$39.75 has been paid to me by counsel for plaintiff in error.

In Witness Whereof I have hereunto set my hand and the seal of the above-entitled court this 23d day of December, 1915.

[Seal]

J. W. BELL,

Clerk of the District Court for the District of Alaska,  
First Division.

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[Endosed]: No. 2732. United States Circuit Court of Appeals for the Ninth Circuit. Juneau Ferry and Navigation Company, a Corporation, Appellant, vs. C. P. Morgan, R. B. Cochran and H. Johansen, Copartners Doing Business Under the Name and Style of the Island Ferry Company, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Filed January 7, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.



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In the  
United States  
Circuit Court of Appeals  
For the Ninth Circuit

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JUNEAU FERRY & NAVIGATION COMPANY,  
a Corporation,

*Appellant.*

vs.

C. P. MORGAN, Et Al,

*Appellees.*

---

UPON APPEAL FROM THE DISTRICT COURT  
FOR ALASKA DIVISION NUMBER ONE.

---

Brief for the Appellants

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J. H. COBB,

*Attorney for the Appellant.*

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In the  
United States  
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JUNEAU FERRY & NAVIGATION COMPANY,  
a Corporation,

*Appellant.*

vs.

C. P. MORGAN, Et Al,

*Appellees.*

---

UPON APPEAL FROM THE DISTRICT COURT  
FOR ALASKA DIVISION NUMBER ONE.

---

Brief for the Appellants

---

J. H. COBB,  
*Attorney for the Appellant.*



## STATEMENT OF THE CASE.

C. P. Morgan, R. B. Cochran and H. Johanson, Co-partners, doing business as the Island Ferry Company, filed their Bill against the Juneau Ferry & Navigation Company, a Corporation, alleging in substance as follows:—

That on November 1st, 1915, the Common Council of the Town of Douglas made and executed a good and sufficient lease, (a copy of which was attached to the Bill as Exhibit A.) to the plaintiffs, whereby the said Common Council leased to the plaintiffs a certain float and premises, and that the plaintiffs, by virtue of said lease, took quiet, undisturbed and peaceable possession of said leased property from the 6th day of November, 1915, up to the 13th day of November, 1915.

That on the 13th day of November, 1915, the defendant, wholly disregarded the rights of the said plaintiffs under said lease, and after notice from the plaintiffs both oral and written, and after notice in writing served upon the defendant to the town of Douglas, a copy of which notice is attached to the Bill and marked Exhibit B., the defendant wrongfully, wilfully and maliciously, and in total disregard of plaintiffs' rights therein, entered upon said float and premises by landing their ferry therein, for the purpose of discharging freight and passengers and loading freight and passengers, to the ex-



clusion of plaintiffs, and to their damage as herein-after alleged;

And it was further alleged that the defendant owned and operated, and does own and operate, a ferry or ferries between the towns of Juneau and Douglas, Alaska, for a number of years past, and that it also owns and controls a good and sufficient float and landing at the town of Douglas, Alaska, and that it has at all times exclusively used its own float for landing its boats for ferry purposes, and that the defendant's float and landing is better located and of superior construction to the float and landing owned, used and controlled by the plaintiffs;

And it was further alleged that the landing and trespass upon the float and premises owned and controlled by the plaintiffs by the defendant was for the purpose of depriving the plaintiffs of their rights and injuring them, and that it was damaging them approximately Fifteen (\$15.00) dollars per day, and that unless the defendant was enjoined from continuing said acts, plaintiffs would be further damaged in the sum of upwards of Thirty-Five (\$35.00) dollars per day;

Plaintiffs further allege they had no clear, speedy or adequate remedy at law, and pray that the defendant be enjoined from landing at, occupying or trespassing upon said float and premises, or in any manner interfering with the plaintiffs exclusive possession of the said float and premises, and for such

further relief as to the Court shall seem just and equitable in the premises and also pray for a temporary Restraining Order pending the hearing.

(Record pp. 1-11)

The lease attached to the Bill as Exhibit A. was a lease in ordinary form, for a period of one year, to "that certain float and landing adjoining the City Dock on the North side of the same, together with all piling and structures incident and appertaining to the same and necessary for the maintenance of said float, and also the gangway and necessary approaches to said float, with the right of ingress and egress to and from said float by land and water." It was executed by the City of Douglas, a Municipal Corporation, by Peter Johnson, President of Common Council and ex-officio Mayor, and purported to be in consideration of the payment of Twenty-five (\$25.00) dollars per month.

(Record pp. 5-7)

Upon the verified Bill, the Court made and entered an Order, November 15th, 1915, commanding the defendant to show cause why an Injunction *pendente lite* should not be issued as prayed for in the Complaint, and in the meantime the defendant was restrained from landing its ferry boats at the float. The Order was

(Record pp. 12-13.)

made returnable November 22nd, 1915. The defendant appeared, and filed an Answer to said Rule

to show cause, wherein it alleged that the plaintiffs do not state facts sufficient to authorize the issue of any injunction, temporary or otherwise, in this: that it appears from said Complaint, and the Exhibit attached thereto, that the Plaintiffs are claiming the right to the exclusive possession and use of the float mentioned in the Complaint under a pretended lease from the City of Douglas, Alaska, which said lease purports to be executed by Peter Johnson, President of the Common Council and ex-officio Mayor of the City of Douglas, while the said Peter Johnson as a matter of law, had no authority to execute said lease, and there are no facts alleged showing any such authority to have been given him; and that the City of Douglas, or its Common Council, had no legal authority to execute the pretended lease to the said dock alleged in the said Complaint or any lease to said dock or float owned by said Municipality, to the exclusion of others desiring similar accomodation thereat.

(Record pp. 15-17.)

And it was further alleged that the defendant was engaged in the business of operating a ferry between the towns of Juneau, Douglas, Treadwell and Thane, all on Gastineau Channel, a navigable arm of the Pacific Ocean, and has been so engaged for more than twenty years last past; and it has invested in its vessels and other appurtenances in connection with said business, a sum of upwards of Fifty thousand (50,000.00) dollars; that the float referred to in

the complaint is a part of the public dock on the navigable waters of Gastineau Channel, constructed by the Municipality of Douglas City, Alaska, some years ago, under the authority contained in the Alaska Civil Code, authorizing municipalities to provide for the construction and maintenance of streets, alleys, sewers and wharves; that said authority, as the defendant is advised, and therefore alleges, only permits the construction and maintenance of such wharves for the use of the general public desiring accommodation thereat, and does not authorize the granting of a special or exclusive privilege to any person or corporation; that a part of the public served by the defendant finds that it is more convenient to land at said float than elsewhere, and the defendant is and has ever been ready and willing to pay all reasonable charges to the City of Douglas, when it shall have established a regular charge for the use of said float, as one of its landing places for the accommodation of the general public.

That the defendant further alleges that it was the purpose and intention of the Common Council of the City of Douglas and of the plaintiffs, in executing said pretended lease, to give to the plaintiffs a special privilege and advantage for the operation of their said ferry boat, to the detriment of the general public seeking transportation to and from said town, and especially to the detriment of the business of the defendant.

And the defendant further alleges that if the



injunction prayed for was granted, it would result in giving to the plaintiffs a special and exclusive privilege for the use of public property and part of the public highways of the said City of Douglas, and a part of the public highway leading from said City to the Outside world, and would result in a great and continuing damage to the business of the defendant.

(Record pp. 15-17)

The Cause came on to be heard upon the Bill, the Rule to Show Cause and the Answer thereto, and thereupon oral evidence for both sides was introduced, all of which is found in the Record

(Record pp. 21-95)

and in substance establishing the following state of fact, stated chronologically, rather than an attempt to follow the order of the testimony itself, because, while the testimony covers some 75 printed pages of the Record, the ultimate facts are comparatively brief.

The Juneau Ferry & Navigation Company had been operating a ferry between Juneau, Douglas, Treadwell and Thane (formerly Sheep Creek), all on Gastineau Channel, for many years past. Prior to the year 1909, the Ferry Company owned the only dock and float or ferry landing at Douglas, and it not only was engaged in the ferry business, but also in the wharfage business, maintaining a wharf for ocean-going vessels. In the year 1909, the City of Douglas began the construction of a City Dock, for



the purpose, as stated by Mr. O'Connor, the then Mayor of the town, "to break the monopoly that existed by the Juneau Ferry & Transportation Company."

(Record p. 22.)

At that time, a float was built on the North side of the main dock, which float was afterwards removed to the South side, and its dimensions increased, for the purpose of being used by the fleet of small boats as a place to tie up at, the South side of the dock being much the most sheltered, but being, on the whole, too shallow, and otherwise inconvenient for ferry purposes.

About 1911, the float in controversy was given to the Town by a Mr. Murray, and the Town, at its own expense, had it put in on the North side, and this was done by the City for the purpose of offering inducements for an opposition ferry to land.

(Record p. 33.)

The float was used generally by the public from the time it was put in until November 1st, 1915. But the inducements offered were not sufficient, apparently, to cause any independent ferry to start in opposition to the business of the defendant until the Summer of the year 1915. Within the last two or three years, however, there was a general increase in the travel between Douglas Island ports on the small boats and ferries, such travel considerably more than doubling. (Record p. 78-79.) So in the

summer of 1915, a ferry was started by the gas boat "Rex."

(Record p. 60.)

Prior to the time that the "Rex," the predecessors of the Island Ferry Company, the plaintiffs, began operations, the fare between Douglas and Juneau was Twenty-five cents (25c), and thereafter it was reduced to Fifteen cents (15c).

(Record p. 57.)

About the 3rd of October, 1915, the Juneau Ferry & Navigation Company began landing the "Teddy," one of their vessels, at both their own dock and the City float or dock, at which time the said dock or float of the City was being used by the public generally, that is, by all the small boats desiring its use operating on the Channel. The reason for this action on the part of the Ferry Company was that many of its patrons, especially the Indians, found it more convenient to use the City Dock in taking or leaving the Ferry than the float of the Juneau Ferry & Navigation Company, and, in order to serve this business, the landings were made at both docks.

(Record pp. 87-88.)

On November 1st, 1915, the following proceedings were had in the City Council of Douglas City, as shown by the minutes, to-wit, "Motion made and seconded, that the North float, Douglas City wharf, be leased to the Island Ferry Company for one year at a rental of Twenty-five Dollars per month, payable in advance. Motion carried." (Record p. 52.)

No authority was shown from the City Council authorizing Peter Johnson to sign the corporate name of the Town to the lease or to execute it, but it appears that the Mayor did sign the lease, a copy of which was attached to the Complaint, on the 13th day of November, 1915, and two days thereafter this suit was brought. There was no proof whatever that there was any interference by any of the defendant's boats with any boats or business of the plaintiffs, except that on one occasion there was a slight difficulty in getting in and out, due principally to a strong tide. (Record p. 58.)

The Court granted the Temporary Injunction prayed for. (Record pp. 18-19.)

The defendant assigned Errors, and appealed from said Order. Errors assigned are two.

(Record p. 97.)

## ASSIGNMENT OF ERRORS.

### I

The Court erred in granting the Temporary Injunction prayed for, for the reason that the evidence conclusively showed that the float or dock mentioned in the Complaint and Restraining Order was a public dock, acquired by the City of Douglas for public purposes that the same had been used for public purposes for several years past, and that the Common Council of the City of Douglas was without power to grant and convey an exclusive lease thereof to the plaintiffs.

## II.

The evidence conclusively showed that the plaintiffs and appellees had no lease to the float and dock mentioned in the Complaint, and were not entitled to the exclusive use thereof.

## ARGUMENT.

*First.* The first and most important question we desire to present is, *WHETHER OR NOT A CITY COUNCIL OF A MUNICIPALITY IN ALASKA, HAS THE POWER TO SELL OR LEASE A PUBLIC FLOAT OR DOCK?*

The powers given to Municipalities in Alaska are, among others, the following, "That the said Common Council shall have and exercise the following powers . . . . Fourth, to provide for the location, construction and maintenance of the necessary streets, alleys, crossings, sidewalks, sewers and wharves."

(Sec. 627, Compiled Laws of Alaska, p. 318.)

This is all the statutory law bearing upon the question in Alaska.

Now, it is manifest that this power to construct or acquire streets, wharves, etc., is to provide for public needs, and property so acquired becomes affected with a public use, and is held in trust for the use of the City, and as such cannot be disposed of by the City Council, so long as this use continues.

"A Municipality owns its avenues, streets and alleys in trust for the general public, and has no



general or implied power to convey them or pervert them to other use. . . . In some States it has been held that a Municipal Corporation holds its public wharves as it does its streets, and that it has no power to sell or lease them to private persons, in the absence of special statutory authority. In other States, the contrary has been held, on the ground that the wharves are not highways, but private property of the Municipality."

28 Cyc. 624.

The reason for the contrary ruling certainly does not apply in Alaska, where as in the case of Douglas City, the only highway to and from the city and the outside world is necessarily over its wharves.

The two cases cited holding that wharves are private property of a Municipality, and as such may be sold are

*Horne v. People*, 26 Mich. 221,

*Thompson v. New York*, 11 N. Y. 115

The great weight of authority, as well as reason, appears to be the other way.

Mr. McQuillan, in his valuable and exhaustive work on Municipal Corporations; lays down this fundamental rule:

"The legal conception early obtained that the powers possessed by public and municipal officers 'must be viewed as public trusts, not conferred upon individual members for their own emolument, but for the benefit of the com-



munity over which they preside.' Therefore, the principle is fundamental and of universal application that public powers conferred upon a municipal corporation and its officers and agents cannot be surrendered or delegated to others."

(McQuillan, Munc. Corp., Vol 1,  
Sec. 382.)

And in treating of municipal wharves, the learned author says:

"Inasmuch as the supreme, or ultimate control over such public places as wharves is vested in the legislature of the state, the authority of a municipal corporation over them is derivative and incapable of being delegated. Hence, a city may not adopt by-laws or pass ordinances or enter into contracts which cede away control or embarrass the state in its legislative or governmental powers and duties. Thus a city cannot lease its wharves, or farm out its revenue, or empower any person or corporation to fix the rates of wharfage. Nor can it lease land which it has condemned for wharf purposes for a term of years, without conditions, to be devoted to private uses. Accordingly, it has been properly held that a grant of power to a municipality 'to provide for the location, construction and maintenance of necessary wharfage' does not authorize an incorporated town in Alaska to grant a franchise to individ-

uals to build wharves on the public streets and navigable waters abutting thereon, and collect tolls for their use.

The controlling principle, as stated and explained elsewhere, is that public powers conferred upon a municipal corporation and its officers and agents cannot be surrendered or delegated to others. Nor is a city vested with any proprietary interest in wharves by reason of power conferred on the mayor and common council 'to erect, repair and regulate public wharves and docks and to regulate the erection and repair of private wharves and to fix the rates of wharfage thereat.' "

(Supra, Section 400.)

Among the cases cited in the text of the learned author is that of *Conradt vs. Miller*, 2 Alaska, 433. In that case the town of Chena had attempted to lease a part of its water front on the Tanana River for the purpose of enabling the lessee to construct a public wharf thereon, to be operated by said lessee. The Court held that—

"Incorporated towns in Alaska have power 'to provide for the location, construction, and maintenance of the necessary wharves, and to provide for wharfage.' Held, that this grant did not empower the town council to grant a franchise to individuals to build wharves on the public streets and navigable waters abutting

thereon, and to collect tolls from the public for using the same."

The case of *Roberts v. City of Louisville*, 13 L. R. A. O. S., 844, is an instructive one. The suit was for an injunction against the passage of a municipal ordinance authorizing the transfer of a wharf owned by the city in trust for the public. In that case the Court said:

"The power of a municipal corporation to acquire land for the purpose of erecting wharves thereon, and to charge wharfage, is not a necessary incident of its character, but must, like all its other powers, be derived directly from the Legislature; of course to be exercised within the limits and upon conditions of the grant. *Dillon, Mun. Corp. Sec. 110.* And, looking to the nature and purpose of such special grant, it must be regarded as a trust, involving duties and obligations to the public and individuals which cannot be ignored or shifted; for the power to acquire implies duty of the municipality through its governing head, to maintain and preserve wharf property for the benefit of the public, without discrimination or unreasonable charges for individual use. In every instance, so far as we have observed, wharf property of the City of Louisville has been acquired under Act of the Legislature, and paid for by taxation; and in no case is there evidence of legislative intention that it should be held otherwise than in

trust for use of the public, and in aid of trade and commerce. The wharf property being so held, the City of Louisville cannot transfer its title or possession, nor, according to a plain and well settled principal, can the general council, which is by statute invested with power of control, and burdened with duty of maintaining, preserving, and operating the wharves, either delegate the power or disable itself from performing the duties."

The same doctrine is announced in *Bateman v. Covington*, 14 S. W, Rep. 361, *Illinois etc. Ry. Co. vs. St. Louis*, 12 Fed. Case, 7007; *Murray vs. Alleghany*, 136 Fed. 57.

*Second:* It is manifest that the lease attached to the complaint and relied upon by the plaintiffs, having been executed by the mayor of the City, without any specific authority so to do, was absolutely void. The adoption of a mere motion that a lease be made does not carry with it authority to any particular person to execute the lease.

But we think the first question discussed conclusive of this case. We respectfully submit that city councils in Alaska are without the power of leasing the public wharves of the Municipality and thereby divesting the municipality and themselves of all power of control over its public property, and that the order granting a temporary injunction should

be reversed and the case remanded, with instructions to dismiss the plaintiffs' bill.

J. H. COBB,  
Attorney for Appellant.



No. 2732

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In the  
United States  
Circuit Court of Appeals  
For the Ninth Circuit

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JUNEAU FERRY & NAVIGATION COMPANY, a  
Corporation,

*Appellant*

VS

C. P. MORGAN, et al,

*Appellees*

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Brief for the Appellees

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Upon Appeal From the District Court for  
Alaska, Division No. 1

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GEORGE IRVING,  
Attorney for Appellees



NO. 2732

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In the  
United States  
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*Appellees*

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Brief for the Appellees

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Upon Appeal From the District Court for  
Alaska, Division No. 1

---

GEORGE IRVING,  
Attorney for Appellees.

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## STATEMENT OF THE CASE.

C. P. Morgan, R. B. Cochran and H. Johanson, co-partners, doing business as the Island Ferry Company, filed their bill against the Juneau Ferry and Navigation Company, a corporation, alleging in substance as follows:

That on November 1st, 1915, the Common Council of the Town of Douglas, Alaska, made and executed a good and sufficient lease (a copy of which was attached to the Bill as Exhibit A) to the plaintiffs, whereby the said Common Council leased to the plaintiffs a certain float and premises, and that the plaintiffs, by virtue of said lease, took quiet, undisturbed and peaceful possession of said leased property from the 6th day of November, 1915, up to the 13th day of November, 1915.

That on the 13th day of November, 1915, the defendant, wholly disregarding the rights of said plaintiffs under said lease, and after notice from the plaintiffs, both oral and written, and after notice in writing served upon the defendant, by the Town of Douglas through its authorized officers, a copy of which notice is attached to the bill and marked exhibit B, the defendant wrongfully, wilfully and maliciously, and in total disregard of plaintiffs' rights herein, entered in and upon said float and premises by landing their ferry thereat for the purpose of discharging freight and passengers and loading freight and passengers, to the exclusion of plaintiffs, and to their damage as hereinafter alleged.

It is further alleged that the defendant owned and operated and does now own and operate a ferry or ferries between the towns of Juneau and Douglas,



Alaska, for a number of years last past; and that they own and control a good and sufficient float and landing at the Town of Douglas, Alaska; that the said Defendant has at all times exclusively used the said float and landing controlled and owned by it for Ferry purposes; that said float and landing is better located and is of superior construction to the float and landing owned, used and controlled by the plaintiffs.

That the landing at, and the trespassing in and upon the said float and premises owned and controlled by plaintiffs, by the said defendant, in total disregard of the rights of the said plaintiffs, and after due and legal notice as hereinafter set forth, to said defendant, was for the sole purpose of depriving plaintiffs of their rights, and injuring plaintiffs in that on account of said acts of trespass committed by defendant as herein set forth plaintiffs have been damaged in an amount which is approximately \$15 per day; and that unless defendant is enjoined from continuing said trespass in and upon said float and premises owned and controlled by plaintiffs, the plaintiffs will be further damaged in a sum upward of \$35 per day and will be obliged to discontinue their said ferry business; That plaintiffs have no plain, speedy nor adequate remedy at law.

Wherefore plaintiff prays that the defendant be enjoined from landing at, occupying or trespassing upon said float and premises, or in any manner interfering with plaintiffs' possession of said float

and premises, and for such further relief as to the court shall seem just and equitable in the premises, and that a temporary restraining order be issued herein enjoining and restraining defendant from continuing the acts and things complained of until further order of the court.

This statement of the case and bill of complaint was duly verified under oath by C. P. Morgan, one of the co-partners of the Island Ferry Company.

Record p 4 and 5.

Attached to and made a part of said complaint are the following exhibits:

#### EXHIBIT "A" TO COMPLAINT: LEASE

"This indenture made this 13th day of November, 1915, between the own of Douglas, Alaska, a Municipal corporation hereinafter designated the party of the first part; and C. P. Morgan and R. B. Cochran, a co-partnership doing business under the name of the Island Ferry Company, hereinafter designated as parties of the second part;

"WITNESSETH: That the said party of the first part for and in consideration of the rents, covenants and agreements hereinafter mentioned, to be kept, paid and performed by the said parties of the second part, their executors, administrators and assigns, has demised and leased to the said parties of the second part the following described premises situated in the Town of Douglas, Alaska, and owned and controlled by the said first party, to wit:

"That certain float and landing ADJOINING

THE CITY DOCK ON THE NORTH SIDE OF SAME, together with all piling and structures incident and appurtenant to the same and necessary for the maintenance of said float; and also the gangway and necessary approaches to said float with the right of ingress and egress to and from said float by land and water."

TO HAVE AND TO HOLD the above described premises with the appurtenances unto the said second parties, their executors, administrators and assigns from the 1st day of November, 1915, for and during the full term of one year from said date.

And the said second parties in consideration of the leasing of the premises aforesaid by the said first party to the said second parties, do covenant and agree with the said first party to pay to the said first party as annual rent for said demised premises the sum of Three Hundred (\$300) Dollars, payable in monthly installments of Twenty Five (\$25) Dollars on the first of each and every month during the full term of this lease contract.

And the said second parties further covenant with the said first party that they will keep said demised premises in a clean and wholesome condition in accordance with the ordinances of the said Town of Douglas, and that at the expiration of the time in this lease mentioned, they will yield up that said premises to the said first party in as good condition as when entered upon, loss by fire, inevitable accidents and ordinary wear thereof and damage by the elements alone exempted.

It is further agreed by the said second parties that they will not sub-let nor under-let said premises nor any portion thereof nor sell, transfer nor assign this lease without having first obtained the written consent of the said first party.

It is expressly agreed and understood by and between the parties aforesaid that if the rent above reserved or any part thereof shall be unpaid on the day of payment wherein it ought to be paid as aforesaid, or if default be made in any of the covenants herein contained, to be kept by the said second parties, their heirs, administrators or assigns, it shall, and may be lawful for the said first party, at its election, to declare said term ended, and re-enter the said premises and expel all persons therefrom, using such force as may be necessary in so doing.

It is further understood and agreed that all the conditions and covenants contained in this lease shall be binding upon the executors, administrators and assigns of the parties to these presents respectively.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands this 13th day of November, 1915.

CITY OF DOUGLAS, A MUNICIPAL  
CORPORATION,

By PETER JOHNSON.

President of Common Council and  
Ex-Officio Mayor.

First Party.

JOE ROBERTSON  
FRANK OLIVER.

C. P. MORGAN  
R. B. COCHRAN,  
Second Parties.



United States of America,  
Territory of Alaska—SS.

THIS CERTIFIES That on this 13th day of November, 1915, before me, the undersigned, a notary public in and for the Territory of Alaska, duly commissioned and sworn, personally appeared Peter Johnson, to me known to be the President of the Common Council of the Town of Douglas, and Ex-Officio Mayor of the same, and also to me personally known to be the individual who signed the foregoing instrument on behalf of the Town of Douglas as the party of the first part thereof, and acknowledged to me that he signed the same on behalf of the said first party; and that he was authorized so to do by the Common Council of the said town of Douglas at a regular meeting held on the first day of November, 1915; and also appeared personally C. P. Morgan and R. B. Cochran, to me known to be the individuals described in and who signed the foregoing instrument as the parties of the second part thereof, and acknowledged to me that they signed the same as their own free and voluntary act and deed, for the uses and purposes therein mentioned.

IN WITNESS WHEREOF I have hereunto set my hand and official seal the day and year in this certificate first above written.

R. R. HUBBARD.

Notary Public for Alaska.

(Seal) My Commission Expires March 21, 1916.  
True copy of original Exhibit "A")



EXHIBIT "B" TO COMPLAINT; NOTICE, ETC.  
COPY

Douglas, Alaska, November 5th, 1915.

To the Juneau Ferry and Navigation Company and  
to all other persons operating boats to and from  
the north float at the City Dock, Douglas.

You are hereby notified that at the Council meeting held in Douglas on November 1st, the north float of the City Dock was leased to the Island Ferry Company for a period of one year and is their exclusive property for that period. Any person operating boats to and from said float or in any manner trespassing on same without permission of the Island Ferry Company, will be prosecuted.

W. A. SHAFER,  
City Marshal.

Copy of the above served on F. Pantermahl, at  
11:35 a. m., Nov. 5, 1915.

W. A. SHAFER,  
City Marshal.

EXHIBIT "B"

COPY

Douglas, Alaska, Nov. 13th, 1915.

Mr. E. J. Margrie, Manager,  
Juneau Ferry and Navigation Company,  
Juneau, Alaska:—

Dear Sir:—

This is to acknowledge receipt of your letter of the 12th Inst. In reply you are advised that the

City Council on Nov. 1st leased the North Float of the City Dock to the Island Ferry Company for a term of one year commencing on November 1st, 1915, at a rental of \$25 per month. This float has been delivered over to the Island Ferry Company and to their exclusive use.

The south float is still available to the public. The City Council has acted wholly within its rights and has not deprived the public of the use of a public float.

It is not the purpose of the Council to maintain two floats and we feel under no obligation to your company to maintain a free additional float on the north side of the City Dock. The lease has been given and the Island Ferry Company is now in possession of the North float. Any further negotiations you have should be conducted with them.

(Seal)

PETER JOHNSON.

Mayor.

R. R. HUBBARD,

City Clerk.

## EXHIBIT "B"

### COPY

Douglas, Alaska, Nov. 11, 1915.

Juneau Ferry and Navigation Company,

Juneau, Alaska

Gentlemen:

I herewith acknowledge receipt of your letter dated Nov. 10th addressed to the writer also of a

letter dated Nov. 5th, 1915, addressed to W. A. Shafer, City Marshal. In answer I will state that the records of the Council meeting held Nov. 1st shows that a motion was made and seconded that the north float of the Douglas City Wharf be leased to the Island Ferry Company for one year at a rental of \$25 per month payable in advance. Motion carried.

I am informed by the City Attorney that Mr. Morgan of the Island Ferry Company informed him that Mr. Margrie of the Juneau F. and N. Company refused to cease landing his boats at the float which the city leased to Mr. Morgan's Company until he was notified by the City authorities of Douglas that the float had been leased (the communication continues) "Will you kindly have Mr. Shafer give a written notice to whoever is in command of the Teddy on her next trip she makes to this float. I enclose herewith a notice which I think will answer the purpose." I am unable to make any further statement as the Council have had no meeting since my return from Seattle on the 2nd Inst. All communications on file in this office will be presented to the Council at their next meeting.

Yours Truly,  
R. R. HUBBARD,  
City Clerk.

(Endorsed) Filed in the District Court, District of Alaska, First Division, November 15th, 1915, J. W. Bell, Clerk, etc. (record page 11)

Upon the filing of the foregoing complaint and

statement of case in the District Court for the District of Alaska, Division No. One. The Judge thereof granted plaintiffs an order to show cause and temporary restraining order on the 16th day of November, 1915.

Record pp. 12, 13 and 14.

That on the 22nd day of November, 1915, said Juneau Ferry and Navigation Company filed an *answer to the rule to show cause*.

Record pp. 14, 15, 16 and 17

The cause came on to be heard upon the bill of complaint, the rule to show cause and the answer thereto and thereupon oral evidence for both sides was introduced.

Record pp. 21-95.

That on the 24th day of December, 1915, Honorable Robert W. Jennings upon hearing of proof in open court issued an injunction order directed to the defendant and appellant herein (penente lite) restraining them from landing their boats at that certain NORTH FLOAT OR LANDING PLACE LOCATED ON THE NORTH SIDE OF THE CITY DOCK OR WHARF AT THE TOWN OF DOUGLAS, ALASKA, OR IN ANYWISE TRESPASSING UPON OR OCCUPYING SAME.

Record p 18-19

The foregoing is a true statement of the case as laid under the pleadings together with the exhibits attached thereto.

## THE APPELLANT ASSIGNS THE FOLLOWING ERRORS.

### I

That the court erred in granting the temporary injunction prayed for for the reason that the evidence conclusively showed that the dock or float mentioned in the complaint and restraining order, was a public dock acquired by the City of Douglas for public purposes, and that the same had been used for public purposes for several years past, and that the Common Council of the City of Douglas was without power to grant and convey an exclusive lease thereof to the plaintiffs.

### II

That the evidence conclusively showed that the plaintiffs and appellees had no lease to the float and dock mentioned in the complaint, and were not entitled to the exclusive use thereof.

## ARGUMENT.

FIRST—WAS THE NORTH SIDE FLOAT OR LANDING, THE ONE LEASED TO THE APPELLEES BY THE TOWN OF DOUGLAS, A PUBLIC FLOAT OR LANDING UNDER THE RECORD IN THIS CASE.

SECOND—WAS THE NORTH SIDE FLOAT, THE ONE IN QUESTION, AND LEASED TO



THE APPELLEES BY THE TOWN OF DOUGLAS, ACQUIRED BY SAID TOWN OF DOUGLAS FOR PUBLIC PURPOSES, UNDER THE RECORD IN THIS CASE: OR IS IT NOT CONCLUSIVELY SHOWN BY THE RECORD THAT THE NORTH SIDE FLOAT, THE ONE IN QUESTION WAS ACQUIRED BY THE TOWN OF DOUGLAS FOR A PARTICULAR PURPOSE; AND IS IT NOT FURTHER SHOWN BY THE RECORD THAT THE SAID NORTH FLOAT, THE ONE IN QUESTION IS AT THIS TIME AND WAS ON NOVEMBER 1st, 1915, THE TIME OF THE GIVING OF THE LEASE, BEING USED FOR THE IDENTICAL PURPOSE FOR WHICH THE SAID TOWN OF DOUGLAS ACQUIRED SAME.

THIRD—IF, UNDER THE CONTENTION OF THE APPELLANT THE SAID UORTH SIDE FLOAT, THE ONE LEASED TO APPELLEES BY SAID TOWN OF DOUGLAS, WAS ACQUIRED BY THE SAID TOWN FOR PUBLIC PURPOSES WOULD THE SAID TOWN OF DOUGLAS THROUGH ITS COMMON COUNCIL HAVE THE POWER TO GRANT AND CONVEY SAID FLOAT AND LEASE THE SAME FOR A PERIOD OF ONE YEAR TO THE APPELLEES.

FOURTH—THE RECORD CONCLUSIVELY SHOWS THAT THE PLAINTIFFS AND APPELLEES HAVE A GOOD AND SUFFICIENT LEASE.

As to the first proposition:—The record shows that the leasing of the north side float by the Town of Douglas to the plaintiffs and appellees was not of a public float or landing but was of a float or landing acquired by the Town of Douglas solely for the purpose for which it was leased;

which said purpose was

First, as a source of revenue to the Town of Douglas;

Second, to break the monopoly of the appellant, the Juneau Ferry and Navigation Company, and as an inducement to an opposition or independent Ferry Company to engage in the Ferry business between the Towns of Douglas and Juneau, Alaska, thereby securing better service and reducing the rates for the carrying of passengers and freight.

Record pp. 23-25-27-29-30-37-38-41-42-47-48-57-73.

As to the second proposition:—The record conclusively shows that the said Town of Douglas did not acquire said north float or landing for public purposes, but on the contrary that said north float and landing was acquired solely for the purpose for which it was leased and that it was not generally used and had fallen into disuse in that it had become rotten and waterlogged.

Record pp. 23-25-26-29-38-84-85-66-73-74.

As to the duty of a municipal corporation “to provide for the location, construction and maintenance of the necessary streets, alleys, crossings, side-

walks, sewers, wharves, etc'' see Chapter 21, page 318, sub-div. 4 of section 627, Compiled Laws of Alaska.

As to the power of President of the Common Council, Ex-Officio Mayor of the Town of Douglas, Alaska, to execute lease, "The common council shall have and exercise the following powers, first; To adopt rules and regulations for their proceedings and to elect one of their members President of the Common council, who shall also be Ex-Officio Mayor of the Town, and who, when chosen shall continue to hold the position of President and Ex-Officio Mayor during the term for which the Council was elected, AND WHO SHALL TAKE CARE THAT THE ORDINANCE AND RESOLVES OF THE COUNCIL BE FAIHFULLY EXECUTED.

Section 627, sub. div. 1, chap 21, Comp. Laws of Alaska.

The common council may exercise their powers by ordinance or resolution, but no ordinance or resolution shall be valid unless adopted by a vote of four members of the Council where not less than five members are present (section 628, page 320, Comp. Laws of Alaska.)

Record p 53, 54

Record p 51, 52, 53

*McQuillin Municipal Corporations vol.*  
3 p. 2528, sec. 1147.

Where the power to dispose of property owned by a city is vested, by statute, in the City Council,

the manner of its exercise not being prescribed, the adoption of a motion authorizing and directing the conveyance of property is as efficacious as the passage of an ordinance.

*Morgan et al vs Johnson, Mayor*; 106 Fed. 452.

As to conformity . . . . . To authority conferred  
 . . . . . to execute,

*Ibid*

As a broad principle of law, municipal corporations through their officers and agents cannot surrender or delegate to others any proprietary interest in wharves by reason of the power conferred on the mayor or common council to erect, control or regulate said public utilities

*McQuillin on Municipal Corporations*, vol. 886, sect. 400.

The court will take judicial notice of the fact that a float, such as the one in question, is a raft of logs capped and decked over with planks and resting upon the surface of the water, rising and falling with the tide action. It is in the nature of personal property as distinguished from a dock or wharf, which is fixed to the soil and permanent in character; and it is susceptible of being moved from place to place without damage to realty for the reason that it is not attached or in anywise fixed to any realty whatsoever; but rests solely upon the surface of the water. (Record p. 66-67.)

There is, however, an exception to this broad



rule of law *and which controls in this case*, to wit; "Where public property under the control of the municipality, has ceased to be used generally, or is not used by the public, then the same may be sold or leased as the public welfare may demand"

*City of Ogden v Bear Lake and River Waterworks and Irrigation Co. et al*; 52 Pac. Rep. 697-699.

Unless restricted by law (and by that I take it is meant the statute under which municipal charter is obtained) a municipal corporation may transfer PROPERTY FOR PARTICULAR PURPOSES, ESPECIALLY IF SUCH PURPOSES ARE CALCULATED TO ADVANCE THE GOVERNMENTAL AND MUNICIPAL INTERESTS OF THE LOCALITY)

*McQuillin on Municipal Corporations*, vol. 3, p. 2524, sec. 1146.

The purpose for which a municipal corporation acquires property for a certain declared purpose and so uses it, does not deprive the city of the power to use the premises for other public purposes where the public necessity thereafter requires that its use be altered. So where land is conveyed to a municipality for certain specified purposes and for any other necessary public use an appropriation of a part of it to a particular use does not exhaust the power of the municipality to apply the same land to a different necessary public use when no longer needed for the original purpose.



*McQuillin on Municipal Corporations,*  
sec. 1126, pp. 2489-90 vol. 3

*Pettit v Macon*, 95 Ga. 645; 23 S. E. 198

*Newell v Hancock*, 35 Atl. 253

The purpose for which a municipal corporation can acquire property for municipal purposes, and the different acts it can perform in so doing.

28 Cyc. p. 610 (B)

WHERE A MUNICIPAL CORPORATION  
MAKES A CONVEYANCE OF PUBLIC PROPER-  
TY THE LEGAL PRESUMPTION IS IN FAVOR  
OF SUCH CONVEYANCE.

The law will usually indulge in presumptions in favor of the authority of the Municipal corporation to convey and also in favor of the legality of the conveyance.

*McQuillin on Munc. Cor. vol 3, sec. 1150, p*  
2531

*Larned vs Jenkins*, 113 Fed 364

Under the record in this case the north side float, the one leased by the Town of Douglas to the appellees was private property of the municipality of Douglas, and, in the absence of a statute or charter provision to the contrary, said municipality has the power to mortgage, lease or pledge said privately owned corporate property.

*McQuillin on Munc. vol. 3, sect. 1144, 1145,*  
p. 2520-21

A municipal corporation has the right to lease or let public places, same being an incident to such ownership.

*Stone v Oconomowoc*; 36 N. W. 829-830

*Bell v City of Plattsville* 36 N. W. 831-33

SALE OR DISPOSAL OF MUNICIPAL PROPERTY—Municipal corporations, it has been said, hold all property in a fiduciary capacity; and they have not the power of disposition which belongs to a private proprietor. All their powers are held in trust for public use, and the validity of their exercise generally depends upon the purpose thereof. And in this manner must be observed the double nature of the corporation and its functions, GOVERNMENTAL AND MUNICIPAL.

Property held by the corporation for strictly Governmental purposes may be sold or disposed of only under express legislative authority. BUT PROPERTY ACQUIRED AND HELD FOR GENERAL MUNICIPAL PURPOSES IS SUBJECT TO ITS DISCRETIONARY POWER OF *USE AND DISPOSAL*

28 Cyc. pages 621-622

The north side float, the one in question, and leased to appellees by the Town of Douglas, was acquired by the Town of Douglas through its Mayor, M. J. O'Connor by gift, and was placed in position by the said Town of Douglas on the north side of the City Dock for a particular purpose and, as a special inducement for an independent ferry company to engage in the ferry business between the Towns of Douglas and Juneau.

Record page 23,37

As a general rule, a municipal corporation has no power to purchase lands except for municipal purposes. But while a municipality cannot purchase lands or other property for other than municipal purposes it may sometimes acquire same by adverse possession or by gift for other than corporate objects; and the cases supporting the general rule that a municipal corporation has no power to purchase property for other than municipal purposes, do not go to the point that a town cannot acquire lands and other property by possession for other than municipal purposes. The acquirement of land by possession does not involve an expenditure, neither does acquirement of land by deed of gift or by devise; and it has been decided that a gift or devise of land to a Town is good, even though the land be given or devised in general terms and be accepted without any intent to use it directly for municipal purposes.

*Land so given, even when not wanted for municipal purposes, may be applied by sale or lease to the alleviation of municipal burdens.*

Vol 3, McQuillin on Munc. Cor. sect. 1114, page 2571-72-73 and cases cited in notes thereunder.

A municipal corporation may rent to private individuals that portion of public property not needed for municipal purposes.

*French v Quincy* 3 Allen, Mass. 9  
*Camden v. Camden* 77 Maine, 530

60 *Vt.* 530

71 *Wis.* 142, 155

20 *Am and Eng Ency. Law.* p. 1187, note 8

20 *Am and Eng Ency. Law,* p. 1188, note 2

Wharves are not highways but private property of the municipality

*Horn v People*, 26 *Mich* 221

*Thompson v N. Y.* 11 *N. Y.* 115

In transactions affecting the ownership of its property a municipal corporation is, within the scope of its powers, regarded much in the light of a private individual.

*Touchard v Touchard* 5 *Cal.* 306

Conclusion; It has been conclusively shown by the record that the float in question, that is, the north side float of the City Dock of Douglas, was placed in position by the Town of Douglas for the purpose of leasing the same to an independent Ferry Company; for the purpose of reducing the passenger fare between the towns of Juneau and Douglas and thereby affecting a great saving to the public of the municipality of Douglas. The evidence shows that at no time was the float ever used by appellant, except when its own float was undergoing repairs and it was more convenient for it to land its boats at the city dock; nor did appellant ever seek to acquire the right to land at said float, but on the contrary refused to use said float and refused to land passengers thereat, until the appellee entered the ferry business in opposition to appellant and reduced the fare.



Only after the entry of the appellees in the ferry business, did the appellant awaken to the fact that it was more convenient for its INDIAN patrons to land at the float in question, notwithstanding the fact that it had been in the ferry business between Juneau and Douglas for a period of twenty years, and that the north side city float had been in place since 1911.

Record page 16, 88

Brief of appellant, page 12

The leasing of this North Side float did not deprive the public of any of its rights, for the reason that the City of Douglas had built and maintained a free public float on the south side of the city dock, which was sheltered from the winds and elements and which was of superior construction and several times larger than the float on the north side. The record shows that this south float was kept in a state of good repair, while the north float, which was being kept by the City of Douglas for the purpose of leasing it to an opposition Ferry Company, pending the entry of such Company into the ferry business, was fallen into a state of disuse and was not in good repair and was unsafe.

Record p 26, 27, 38, 48, 49, 66, 85

The fact that this north float was in such a condition, while a good and adequate float was maintained for the public on the south side, would alone be sufficient evidence that the north side float was not intended for a free public float but was placed



there for the purpose for which it was leased to appellees, as testified to by former mayor O'Connor and Ex-Councilman Brie and Keist.

All the evidence in the record shows that for twenty years the appellant, the Juneau Ferry and Navigation Company had been engaged in the transportation of freight and passengers between the towns of Juneau and Douglas, Alaska; that they had a complete monopoly of this business, that they owned and maintained a well equipped dock and a float and landing of superior construction and one of the best of its kind in Alaska; and that they charged twenty-five cents for the transportation of a single passenger between the towns of Douglas and Juneau. That the common councils of the Town of Douglas had, for a number of years sought to break this monopoly and reduce this fare. They sought this for the purpose of serving the interests of the taxpayers and residents of Douglas, and saving them thousands of dollars annually.

Not until the year 1915, were they able to induce an opposition ferry Company to enter this business. Prior to the building of the City Dock, by the Common Council in 1909, the appellant owned the only dock and the only float in Douglas. The evidence shows that this float was more convenient for the public and more convenient for the use of the appellants in their ferry business, being three minutes nearer the Town of Juneau than the float afterward acquired by the City and leased to the appellees.

Record p 63-84

The evidence further shows that the appellees, immediately upon their entry into the transportation and ferry business, reduced the fare between Douglas and Juneau to fifteen cents.

The only object of the appellant in seeking to land at the north side float, was to harass and annoy the appellees, to delay them in their own landings, as the record shows that they timed their arrivals and departures to and from this float so as to exclude the boat of the appellees, the float being too small to accommodate two boats at the same time, and that appellant adopted the same signals on arrival and departure as those used by the appellees, for the purpose of confusing and misleading patrons of appellees. Record p. 56.

THE ONLY OBJECT OF THE APPELLANT IN SEEKING TO CONTROL THIS NORTH FLOAT OR IN EVEN SEEKING TO USE IT WAS TO FORCE THE APPELLEES OUT OF THE FERRY BUSINESS AND TO COMPEL THEM TO DISCONTINUE THE SAME IN ORDER THAT APPELLANTS MIGHT AGAIN HAVE A MONOPOLY OF THE BUSINESS, INCREASE THE FARE AGAIN TO TWENTY-FIVE CENTS TO THE GREAT LOSS AND DAMAGE OF ALL THE TAXPAYERS AND RESIDENTS OF DOUGLAS AND OF ALL THE RESIDENTS OF THE DIFFERENT COMMUNITIES ON GASTINEAU CHANNEL

We respectfully submit that the learned District Judge was correct in granting the temporary restraining order, upon the facts submitted and upon the record as made; and that said temporary order as made by said District Court should not be disturbed.

GEORGE IRVING,  
Attorney for Appellees.















